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No. _____

In The

Supreme Court of the United States

DEJA VU OF NASHVILLE, INC., JOHN CHRISTOPHER COX, GOOD TIMES, INC., DENISE BENSON, DELAINA A. CAISE, JAMES CORBETT CHICK, d/b/a THE BRASS STABLES, C&A ENTERTAINMENT, INC., AND DAWN PIERCE,

Petitioners,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; ROBERT E. KIRCHNER, JR., CHARLES W. BURSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. UNDER WHAT CIRCUMSTANCES MAY THE GOVERNMENT CRIMINALIZE, CONSISTENT WITH THE FIRST AMENDMENT, NON-OBSCENE LIVE NUDE AND SEMI-NUDE PERFORMANCE DANCE ENTERTAINMENT THAT IS PRESENTED TO A CONSENTING ADULT AUDIENCE?

2. WHAT ARE THE EVIDENTIARY BURDENS ON THE GOVERNMENT IN A "SECONDARY EFFECTS" CONTEXT TO ESTABLISH: 1) WHETHER AN ANTI-NUDITY REGULATION FURTHERS AN IMPORTANT OR SUBSTANTIAL GOVERNMENTAL INTEREST; AND 2) WHETHER THE REGULATION IS NO GREATER THAN IS ESSENTIAL TO THE FURTHERANCE OF THAT INTEREST?

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LIST OF PARTIES

The parties to the proceedings in the Sixth Circuit were Petitioners Deja Vu of Nashville, Inc., John Christopher Cox, Good Times, Inc., Denise Benson, Delaina A. Caise, James Corbett Chick, d/b/a The Brass Stables, C&A Entertainment, Inc., and Dawn Pierce, as well as Steve C. Cooper, Southern Entertainment Management Co., Inc., Entertainment USA of Tennessee, Inc., Ralph Lunati, Pure Passion, Inc., Sherrod Jackson, D.L.S., Inc., d/b/a Diamonds and Lace Showbar, Ann Martin, Renita Henegar, and Michelle Morjal as additional plaintiffs/appellants; and Respondents Metropolitan Government of Nashville and Davidson County, Tennessee, Robert E. Kirchner, Jr., and Charles W. Burson, as well as the City of Memphis, Melvin E. Bibbs, City of Chattanooga, Tennessee, Mayor Gene Roberts, City Council of Chattanooga, Chairperson Mai Bell Hurley, Councilpersons Don Eaves, David Crockett, David Disteffano, Yuseff Hakeem, John Lively, Leamon Pearce, Marti Rutherford, Ron Swafford, Chief of Police Ralph Cothran, City Attorney Randall Nelson, and Safety Administrator Ervin Dinsmore as additional defendants/appellees.

There are no entities to report or list pursuant to Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at App. 1-10; the underlying opinion of the United States District Court granting summary judgment to the Defendants appears at App. 11-66; the order of the Sixth Circuit denying a motion for rehearing is found at App. 124; the opinion of the United States Court of Appeals on a prior interlocutory appeal reversing the denial of a motion for preliminary injunction appears at App. 67-70; and the opinion of the United States District Court denying a motion for preliminary injunction appears at App. 71-82. All four opinions are unpublished.

JURISDICTION

The Court of Appeals entered its judgment on January 13, 1999. Petitioners timely filed a petition for rehearing with suggestion for rehearing en banc, which was denied by the Sixth Circuit on March 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

"Congress shall make no law . . . abridging the freedom of speech. . . . "

Amendment XIV, Section 1

Section 1 of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CODE

42 U.S.C. Section 1983

42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . . "

TENNESSEE STATUTORY PROVISIONS

The various Tennessee statutory provisions involved are reproduced in the Appendices. These include the indecent exposure statute, T.C.A. § 39-13-511 (App. 125); the amendments thereto which created the new crime of "public indecency" (App. 126-131); the combined codified version of T.C.A. § 39-13-511 (App. 132-35); the statutory definition of "public place" as set forth in T.C.A. § 39-11-106(29) (App. 136); the Tennessee obscenity statute, T.C.A. § 39-17-901 (App. 137-140); and the Tennessee fiscal note statute, T.C.A. § 3-2-107 (App. 141-42).

STATEMENT OF THE CASE

This is a cause of action brought by the Plaintiffs pursuant to 42 U.S.C. § 1983 to enjoin enforcement of and to declare as unconstitutional a portion of Tennessee's "public indecency" statute. Federal jurisdiction existed in the District Court under the Federal Civil Rights Act, and pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201, and 2202, as well as Fed.R.Civ.P. Rules 57 and 65(A).

Prior to 1994, Tennessee law included an "indecent exposure" statute, T.C.A. § 39-13-511, which generally criminalized the exposure of a person's genitals or buttocks in a circumstance that would offend an "ordinary viewing person" or where the exposure was done for the "purpose of sexual arousal and gratification of the Defendants." App. 125. That statute was judicially construed ***not*** to apply to nude performance dancing. *State v. Raggert*, No.'s 91-4787, 91-4788. App. 145-46.

In 1994, the Tennessee legislature enacted amendments to T.C.A. § 39-13-511 (referred to herein as "Ch. 542" and found at App. 126-131) in order to create the new crime of "public indecency." Chapter 542 purports to generally criminalize "public nudity." Yet, the statute is legislatively gerrymandered by a virtual laundry list of exceptions to the extent that it applies to erotic performance dance entertainment and little else. These exceptions include but are not limited to a person performing an excretory function in an unincorporated area of the state (App. K (App. 126-131), § 1(a)(2)); a person appearing in a state of nudity in a modeling class operated by certain schools or universities (§ 1(b)(2)); a private facility which has been formed as a family-oriented clothing optional facility, properly licensed by the state[1] (*id.*); and,

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[1] The State of Tennessee has no licensing procedures for such facilities.

most significantly, "any theatrical production which contains nudity as defined by this section performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit" ***and*** which does not violate the Tennessee obscenity statute (§ 1, unnumbered section).

Noteworthy in considering the constitutionality of this statute is the fact that Ch. 542 contains a ***reverse*** severability clause, requiring the invalidation of the ***entire*** legislation "[i]f any provision of this Act or the application thereof to any person or circumstance is held invalid . . . ." App. 131, at § 4.

Before the amendments found in Ch. 542 took effect, the "Deja Vu" Plaintiffs[2] (a number of businesses and individuals that present or engage in the presentation of nude and semi-nude performance dance entertainment to the adult public) filed suit in the United States District Court, Middle District of Tennessee, Nashville Division, to enjoin enforcement of the statute and to have it declared unconstitutional. They raised both facial and "as applied" attacks in regard to the First Amendment aspects of the challenged law, as well as claims of equal protection and due process deprivations. The District Court denied a motion for preliminary injunction in an Order and Memorandum entered July 1, 1994. App. 71-82.

An interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) was then taken to the Sixth Circuit. At approximately the same time, the Defendants filed a motion in the District Court to dismiss for failure to state a claim and/or for summary judgment.

Pursuant to a motion of defendants in other similar litigation pending across the State of Tennessee, the Judicial Panel on Multidistrict Litigation issued an order

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[2] Petitioners Deja Vu of Nashville, Inc., John Christopher Cox, Good Times, Inc., Denise Benson, and Delaina A. Caise.

pursuant to 28 U.S.C. § 1407 transferring all then-existing cases concerning the constitutionality of Ch. 542 to the Middle District of Tennessee. App. 85-87. In furtherance of that order, five other cases were ultimately consolidated in the Middle District for adjudication, including that of the "Chick" Plaintiffs.[3]

In discovery, the District Court required the Defendants to provide certain information relevant to the issues to be tried, including "secondary effects" information relied upon by the Tennessee legislature during consideration of Ch. 542. App. 91-93. Subsequently, the Deja Vu and Chick Plaintiffs filed their responses to the motions to dismiss/for summary judgment along with their own motions for summary judgment.

While briefing continued on the cross-motions, the Sixth Circuit entered a ruling reversing the District Court's refusal to enjoin Ch. 542. App. 67-70. The appellate court succinctly stated:

> " . . . [W]e REVERSE the district court's judgment, GRANT the Plaintiffs a preliminary injunction, and REMAND the case to the district court ***for an expedited trial on the merits***."

App. 70 (bolding and italics emphasis added).

No "expedited trial on the merits" ever occurred. Rather, on September 30, 1996, the District Court granted summary judgment to the Defendants, dismissed the Plaintiffs' complaints, and denied the Plaintiffs' motions for summary judgment. App. 11-66.

The District Court subsequently granted a motion for a stay pending appeal and further granted, in part, a motion for relief from judgment with regard to an amended complaint that had been filed by the Deja Vu Plaintiffs. App. 96-123. The court ruled, however, that the

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[3] Petitioners James Corbett Chick, d/b/a The Brass Stables, C&A Entertainment, Inc., and Dawn Pierce.

portion of the Deja Vu amended complaint which it was reinstating – a request by the Plaintiffs to have the Court declare that the Plaintiffs fell within the "theatrical production" exception of Ch. 542 – was not to proceed to trial until the Sixth Circuit had ruled on its earlier decision granting summary judgment to the Defendants. App. 121.[4]

Plaintiffs then timely appealed (again) to the Sixth Circuit. In a per curium opinion, the appellate court affirmed, finding that Ch. 542 complied with Justice Souter's concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). App. 1-10.

The Court of Appeals upheld the constitutionality of Ch. 542 against a vagueness challenge, even though the District Court in its various rulings had referred to the "inane exception for one who makes an attempt to conceal himself or herself from view while publicly performing an excretory function in an unincorporated area of the State" – an exception that the court could not explain (App. 79 n.4); to the employer liability provision that the court acknowledged was "clearly grammatically incorrect" (App. 44); to the modeling class exception which the court conceded was "inartfully worded" (App. 47); to the family-oriented clothing-optional facility exception which the court found to be awkwardly drafted (App. 47); to the fact that while the nudist facility exception requires such an establishment to be licensed by the state, there is no such statutory licensing scheme under Tennessee law (App. 48-49); and to the fact that the court acknowledged that the "public place" definition left "room for interpretation" (App. 51).

Timely motions for reconsideration with suggestions for rehearing en banc were denied by the Sixth Circuit in

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[4] This circumstance does not apply to the Chick Plaintiffs. Their case is completely concluded.

an Order dated March 18, 1999. App. 124. Plaintiffs then filed a motion for stay pending the filing of a petition for a writ of certiorari, which was denied by the Sixth Circuit. Justice Stevens denied a similar motion. This petition follows.

REASONS FOR GRANTING THE WRIT

This Court has recently granted certiorari in the case of *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Penn. 1998), to consider a limited question in regard to the constitutionality, under First Amendment analysis, of an "anti-nudity" regulation. Presumably, this was to resolve the conflict in the lower courts over the question of which opinion represents the "holding" of the highly fractured decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). *Compare, e.g., Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (following Justice Souter's "secondary effects" concurring opinion); *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997) (following the Chief Justice's plurality opinion); and *Pap's* (following the *Barnes* dissent).

Respectfully, adjudication of the *Pap's* question will not resolve a number of fundamental legal issues in this area, particularly if this Court adopts Justice Souter's "secondary effects" rationale as the Sixth Circuit did here. Even the challenged ordinance in the Pennsylvania decision preordains a very limited review. At issue in *Pap's* is a true law of general applicability. With the limited exceptions of small children and women breast-feeding, all public nudity is banned. 719 A.2d at 276. This is analogous to the regulation at issue in *Barnes*. Such is not the case, however, with Ch. 542, which not only permits many forms of non-expressive public nudity, but even distinguishes between criminal and permissible nude dancing on the standardless basis of "serious artistic merit."

Review of the Tennessee statute, with its obvious due process, vagueness, and equal protection implications, will also necessitate this Court engaging in a facial overbreadth analysis; an important constitutional question that will not necessarily be decided in *Pap's* and which was specifically reserved in *Barnes*. And, as will be discussed below, the issues of equal protection violations and facial overbreadth, unique to this case and not at issue in *Pap's*, are inexorably intertwined and should be constitutionally evaluated together. Similarly, because of the basis upon which the Pennsylvania Supreme Court ruled, review of the *Pap's* decision will not entail an analysis of the secondary effects doctrine and its judicial expansion beyond the bounds as established in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

The confusion wrought by *Barnes* over the past eight years should not be permitted to continue any longer as a result of this Court either having to reserve once again resolution of the fundamental overbreadth issue, or being unable in *Pap's* to address the matters raised here. This Court should therefore accept review of this case in order to put to rest the issues set out below, which in some cases will not, and in other cases may not, be decided in *Pap's*.

A. THE FRACTURED NATURE OF THE PLURALITY OPINION IN *BARNES* HAS CAUSED CONFUSION IN AND CONFLICT AMONG THE CIRCUIT COURTS AND STATE COURTS OF LAST RESORT, AND HAS LED INFERIOR COURTS TO DISREGARD OTHER RULINGS OF THIS HONORABLE COURT.

1. CONFLICTS CONCERNING THE ISSUE OF "CONTENT-NEUTRALITY".

In this action, the Plaintiffs presented evidence, discussed neither in the district nor circuit court opinions,

that the fundamental purpose and intent of Ch. 542 was to preclude nude performance dance.[5] The district court expressly acknowledged this content-based targeting by noting, in regard to the original public indecency law being construed to not prohibit nude dancing, that "this lack of remedy was one of the ***primary reasons*** for passing Chapter 542". App. 108 (emphasis added).

Nevertheless, the appellate court evaluated this statute under intermediate scrutiny, concluding the law to be "content-neutral." App. 4. It seems apparent from this ruling and the decision in *Richland Bookmart Inc. v. Nichols*, 137 F.3d 435, 438-440 (6th Cir. 1998) (discussed, *infra*), that in the Sixth Circuit, regulations of "adult entertainment" (whatever that may generally mean) must *per se* be evaluated pursuant to

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[5] This evidence included statutory preambles that discussed nude dancing and nude dancing establishments (App. 126-27); legislative history that confirmed that Chapter 542 was directed at prohibiting nude performance dance entertainment (App. 150-53); the testimony of a Fed.R.Civ.P. 30(b)(6) deponent produced by the state who confirmed, in response to questions utilizing the particular language from decisions of this Court which demarcate content-neutral from content-specific laws, that Chapter 542 was not "content-neutral" (App. 154-56); reference to the statutory exemptions which included a "theatrical" exemption that specifically distinguished between permitted and banned performances – ***unrelated to any connection with "adult" entertainment or "secondary effects"*** – based upon their ***content*** (i.e., whether they possessed "serious artistic merit" or not); statements of the Defendants in this litigation which substantiated that Ch. 542 was directed at the ***primary impact*** of nude performance dance entertainment upon its viewers – therefore rendering it content-specific pursuant to *Boos v. Barry*, 485 U.S. 312 (1988) (App. 163-170); and expert witness affidavits and psychological studies prepared directly for this litigation which established that nudity is an integral part of the ***content*** of erotic dance (App. 190, 203-236).

the content-neutral standard of intermediate scrutiny, ***regardless of whether a challenged law is, in actuality, content-specific.***

This position conflicts with decisions of other circuits and other state courts of last resort which have evaluated laws that make such content-based distinctions pursuant to strict, as opposed to intermediate, scrutiny. *See, e.g., MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 494 (5th Cir. 1994) (any argument that a law which distinguishes nude dance clubs based on advertising is content-neutral "exalts form over substance"[6]); *Connor v. Town of Hilton Head Island*, 442 S.E.2d 608, 609-10 (S.C. 1994) (law targeting nude dancing was content-specific subject to strict scrutiny); *Georgia v. Cafe Erotica, Inc.*, 500 S.E.2d 574, 575-576 (Ga. 1998) (law which criminalized the admission of persons under the age of 21 to premises whereon there is exhibited "sexually explicit nudity on the part of one or more live performers" is a content-based regulation subject to strict scrutiny); and *Pap's*, 719 A.2d at 279-280.

The Sixth Circuit's conclusion also conflicts with the recent decision of *Reno v. ACLU*, 521 U.S. 844 (1997), where this Court evaluated the constitutionality of a federal statute seeking to ban "indecent" and "patently offensive" communication on the Internet because minors could be exposed to sexually explicit fare. *Id.* at 859. The government defended by claiming that the regulation should be evaluated as a content-neutral law, and invoked both *Renton* and the specter of "secondary effects" in defense of the legislation. *Id.* at 864-65, 868. Regardless, this Court found the law to be content-specific, and thus subject to strict scrutiny. *Id.* at 868.

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[6] But, *cf., Hamilton Amuse. Center v. Verniero*, 716 A.2d 1137, 1143 (N.J. 1998) (law regulating advertising of adult entertainment establishments was analyzed as being content-neutral).

The "development" of Sixth Circuit precedent in this area well exemplifies the direction of judicial analysis down the proverbial slippery slope to the point where the substantive principles underlying the constitutional concept of content-neutrality seem to have lost all meaning and relevance. Initially, in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), *cert. denied*, 519 U.S. 909 (1995), the court held that an adult business licensing and zoning ordinance was content-neutral because the "ordinance does not attempt to ban such businesses, ***nor does it pass judgment on the content of the products sold or entertainment provided by sexually oriented businesses.***" *Id.* at 226 (emphasis added).[7] That determination could be considered consistent with this Court's decision in *Renton*.

Then, in *Richland Bookmart*, the court inexplicably concluded that these types of regulations ***really are content-specific, but that they should nevertheless be analyzed as being content-neutral as long as they do not eviscerate the entertainment***. *See* 137 F.3d at 438 (law regarding hours of operation of "adult" businesses was "obviously not content-neutral"); and *id.* at 440 ("a kind of legal fiction has been created that calls regulation of such literature 'content neutral' when what is meant is only that the regulation is constitutionally valid"). The question, the Sixth Circuit posited, is: "Does the law in question unduly restrict 'sexually explicit' or 'hard-core' erotic expression?" *Id.* at 440. Since the law at issue only regulated the ***time*** of day when such businesses could operate, the court answered the question in the negative.

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[7] *See also, Connection Distributing Co. v. Reno*, 154 F.3d 281, 292 (6th Cir. 1998) (age verification requirement was subject to intermediate scrutiny as "the provisions ***do not prohibit the sexually explicit speech*** at issue") (emphasis added).

Now, here, Ch. 542 – in the words of *East Brooks Books* – "passes judgment on the content of the . . . entertainment provided" at these establishments. And, in the language of *Richland Bookmart*, the law not only "unduly restricts", but it ***totally precludes*** live " 'sexually explicit' [and] 'hard-core' erotic expression" – not to mention mere nude and topless dancing – by requiring the entertainers to "cover up." Accordingly, in each new case, the Sixth Circuit has slipped farther down the slope to where its position is now that all laws regulating "adult" entertainment, ***regardless of intent or content***, are to be analyzed under intermediate scrutiny.

This "evolution" of Sixth Circuit precedent is solely predicated upon its adherence to the secondary effects doctrine in *Renton* as modified in Justice Souter's *Barnes* concurrence; matters that may well escape examination by this Court in *Pap's*. Certiorari should therefore be granted to clarify these murky constitutional issues.

In addition, this Court should grant the requested writ in order to address the unresolved question of when a purported "neutral" law sufficiently "targets" expression – either directly or by legislative gerrymandering as in Ch. 542 – so as to be subject to strict constitutional scrutiny.[8]

In *Turner Broadcasting Systems, Inc. v. F.C.C.*, 512 U.S. 622 (1994), this Court noted in a "non-adult" decision that an inquiry must be made into the "manifest purpose" of a

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[8] The effect of such legislative gerrymandering on the ultimate neutrality of a law has been addressed in detail in a "free exercise" context in the opinion of this Court authored by Justice Kennedy in *Church of Lukumi v. Hialeah*, 508 U.S. 520 (1993). *See*, in particular, *id.* at 535-536. That decision's relevance to free speech jurisprudence is, however, not clear.

regulation ***even if it was neutral on its face***.[9] *Id.* at 642-43, 645-46. Yet, the closest that this Court has come to addressing whether such legislative gerrymandering in a secondary effects context moves the regulation from being content-neutral to being content-based, is its passing reference in *Renton* to an analysis undertaken by the lower court in evaluating the " 'predominant' intent" of the legislation. *Renton*, 475 U.S. at 47-48. *See also, Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), where Justice O'Connor, joined by Justice Stevens, opined that a heightened First Amendment analysis was necessary if the government used a neutral statute "as a pretext" "for closing down a bookstore because it sold indecent books ***or because of the perceived secondary effects of having a purveyor of such books in the neighborhood*** . . . ". *Id.* at 708 (O'Connor, J., concurring) (emphasis added).

> As recently noted by the Ninth Circuit, however:
>
> "[P]recedent provides no standards for determining when an illicit but inconsequential 'motivating factor' might develop into an illicit and controlling 'predominant purpose.' "

Colacurcio v. City of Kent, 163 F.3d 545, 551 (9th Cir. 1998). This case, adjudicating the quintessentially gerrymandered "law of general applicability" so that it basically affects erotic performance dance entertainment and nothing else, presents an appropriate vehicle for this Court to establish much needed guidance on the issue of when such regulations are subject to strict scrutiny.

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[9] *See also, Discotheque v. City Council of Augusta*, 449 S.E.2d 608, 609 (Ga. 1994) (preambles to legislation indicating a content-neutral purpose are only "self-serving conclusory hearsay").

2. CONFLICTS IN REGARD TO THE GOVERNMENT'S BURDEN TO ESTABLISH THE SECOND AND FOURTH PRONGS OF *O'BRIEN*, AND THE ABILITY TO DISPROVE THE ASSERTION OF SECONDARY EFFECTS.

When utilizing intermediate scrutiny, this Court has clearly held that the government bears the burden to establish that the regulation "furthers" an important or substantial interest and that the regulation is "no greater than is ***essential*** to the furtherance of that interest." *Renton*, 475 U.S., at 46-47; *United States v. O'Brien*, 391 U.S. 367, 377 (1968). In order to be able to evaluate these second and fourth prongs of the *O'Brien* test, a court must be presented with a sufficient legislative record which contains evidence "as to how effective or ineffective" the regulation is or might prove to be. *Denver Area Educ. Tel. v. F.C.C.*, 518 U.S. 727, 760 (1996). Courts are to carefully review these issues rather than merely defer to the legislature. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508-514, 528-532 (1996) (eight justices in two opinions rejecting the deference accorded to the legislature in intermediate scrutiny cases as expressed in *Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344-47 (1986)).

The Sixth Circuit decision here completely lifts these evidentiary burdens from the broad shoulders of government. It treats as irrelevant and immaterial the precedent of this Court set forth immediately above. Succinctly put, there was nothing in the record below presented by the government, nor is there anything contained in the appellate opinion, which indicates how requiring a woman to wear pasties and a G-string reduces urban blight, increases property values, or otherwise ameliorates adverse secondary effects.[10]

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[10] *See also, Nakatomi Investments*, 949 F. Supp. at 997-998 (there is no "logical relationship" between the percentage of

In this action, Plaintiffs submitted a list of contested material facts pursuant to Local Rule 8(b)(7)(c)[11] in response to the Defendants' motion, and also filed their own statement of material facts in support of their cross-motion. Most of Plaintiffs' contested facts dealt with the *Renton* "reasonable reliance" issue of whether the Tennessee legislature had before it any evidence regarding a connection between "secondary effects" and nude dancing, or evidence substantiating that donning pasties and G-strings would in some material fashion alleviate these supposed problems. App. 339-342, Contested Facts 3, 4, 5, and 6. The state's response to each of these contested facts was that they were immaterial to adjudicating the Defendants' summary judgment motion. *Id.*

In addition, the Plaintiffs submitted a 51-page affidavit (with exhibits) of Robert Bruce McLaughlin, a land use planning consultant and a member of the American Institute of Certified Planners. He was provided all materials obtained in discovery from the Defendants and conducted his own investigation, research, and studies in regard to any "secondary effects" associated with the Plaintiffs' type of establishments in Nashville. Mr. McLaughlin concludes in his affidavit – which was unrefuted by the Defendants in the cross-summary judgment motions – that no materials were presented to the Tennessee legislature establishing secondary effects being associated with the type of nude dancing establishments at issue or that the provisions of Ch. 542 would in any way ameliorate any such evils if they existed. App. 252-90, ¶'s

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clothing worn by an entertainer and the occurrence of secondary effects); and *Pap's*, 719 F.3d at 280 (same). *See also* Fiscal Note to Ch. 542 (App. 292) noting no significant economic impact of the legislation, and the fiscal note statute (App. 141-42).

[11] Local Rules of the United States District Court for the Middle District of Tennessee (App. 143-44).

28, 33-36, 42, 49-72, 78-81, 110. The court of appeals opinion, however, inexplicably ignored this evidence and thereby relieved the government of the burden of establishing the second and fourth *O'Brien* elements.

On this issue as well, the opinion of the Sixth Circuit conflicts with numerous decisions reached by other circuits and by other state courts of last resort. The clearest example of this is the recent ruling of the Fifth Circuit in *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998), where the court analyzed a challenge to a city ordinance prohibiting certain forms of public nudity predicated upon "combating secondary effects." *Id.* at 365. The record before the circuit court did not indicate whether the city had considered any studies on secondary effects (as required by *Renton*) prior to enacting the ordinance. *Id.* Regardless, the district court ordered summary judgment on behalf of the municipality (as was done here). *Id.*

Beginning its analysis by noting that the government – not the court – bears the obligation of justifying ("i.e., both the burden of production and persuasion") the challenged statute, *id.* at 370, 374, the Fifth Circuit reversed and agreed with the plaintiff that "the government must produce evidence that the challenged ordinance may advance its interest in combating adverse secondary effects attendant to nude dancing." *Id.* at 371.[12]

More specifically, the Fifth Circuit observed that this Court's decision in *Renton* "instructs us that a government must present sufficient evidence to demonstrate 'a link between the regulation and the asserted governmental interest . . . ' ", *id.* at 372, and that Justice Souter's

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[12] *See also, Schultz v. City of Cumberland*, 26 F. Supp.2d 1128, 1148 (W.D. Wis. 1998) ("*Renton* and *Barnes* do not mean that defendant enjoys a free ride. In particular, defendant still must produce some evidence to justify its regulations"), *citing J & B Entertainment*, 152 F.3d at 372.

concurring opinion in *Barnes* "does not eliminate the government's burden of introducing sufficient evidence to justify the challenged ordinance." 152 F.3d at 372.[13] To insist on less, the court observed, would "reduce the First Amendment to a charade." *Id.* at 372-73. The same result was reached in *Phillips v. Borough of Keyport*, 107 F.3d 164, 178 (3d Cir. 1997) (en banc), *cert. denied*, 139 L.Ed.2d 261 (1997).[14] The appellate decision here is diametrically

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[13] *Cf.*, the Sixth Circuit decision in *Triplett Grille*, 40 F.3d at 135 ("By requiring affirmative evidence of a secondary effects motivation, the district court imposes a burden on the City that Justice Souter's opinion seems designed to avoid").

[14] *Accord, International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1162 n.3 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992); *Lounge Management, Ltd. v. Trenton*, 580 N.W.2d 156, 159 (Wis. 1998), *cert. denied*, 119 S.Ct. 511 (1998) (in evaluating the constitutionality of a law which impacted upon nude dancing, the Wisconsin Supreme Court noted that "when an ordinance regulates the exercise of First Amendment rights, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt"); *Discotheque*, 449 S.E.2d, at 609-10 (the granting of summary judgment – as is the case here – was inappropriate when the government introduced no evidence of either information it relied upon, or any connection of the adult businesses at issue there to secondary effects); *T & D Video, Inc. v. City of Revere*, 670 N.E.2d 162, 165 (Mass. 1996) (only evidence that government entity actually relied upon in enacting legislation can be considered when evaluating the governmental interests involved); *Steverson v. City of Vicksburg*, 900 F. Supp. 1, 11-13 (S.D. Miss. 1994) (anti-nudity law did not pass secondary effects analysis as city failed to present appropriate evidence, and court could not "construe any factual basis" that would support a total ban of nude dancing at adult businesses). *See also, United States v. Virginia*, 518 U.S. 515, 533 (1996) (government justification for a regulation "must be genuine, not hypothesized or invented *post hoc* in response to litigation"). *Cf., Colacurcio*, 163 F.3d at 551 ("The case law has not

opposed to both of these recent circuit rulings, as well as with the decisions of this Court discussed, *supra*.

The two appellate decisions in this case well-illustrate this conflict. The first opinion remands for an "expedited trial on the merits" to enable the government to meet its evidentiary burden. That trial, however, never occurs. Yet, the second panel opinion ignores this failing and thereby relieves the government of any such empirical obligation. Without discussion or explanation, the second opinion of the Sixth Circuit here renders its first decision in this action to have been a virtual nullity.

Similarly, the Sixth Circuit decision here precludes the Plaintiffs from having any opportunity whatsoever to refute either the existence of secondary effects or the necessity of the regulation to ameliorate the same. In his affidavit, Mr. McLaughlin also opined that based upon his own research, there were no such "secondary effects" associated with the plaintiffs' type of upscale gentlemen's clubs. App. 252-90, ¶'s 30-33, 73-77, 82-110. And, again, the appellate court gave no consideration whatsoever to this unrefuted testimony.

Other circuits have established, however, that it is the right of a litigant to be "afforded some opportunity" to offer evidence to refute the assertions by the government of secondary effects being associated with one's business. *See, e.g., J & B Entertainment*, 152 F.3d at 375 n.10 (5th Cir.); *Phillips*, 107 F.3d at 175 (3rd Cir.). *See also, United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1937) (the mere pronouncement of a legislature of "opprobrious epithets to the prohibited act" cannot forestall an attack upon the constitutionality of a regulation, and such a law would "deny due process which precluded the disproof

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clarified when secondary effects warrant restriction of speech and how much proof there must be of these effects"), *citing* Erwin Chemerinsky, *Constitutional Law*, § 11.3.4.4., p. 840 (1997).

in judicial proceedings of all facts which would show or tend to show" the basis for such a law).

These conflicts as to the evidentiary burden upon the government to prove the constitutionality of the regulation, and a litigant's opportunity to attempt to refute the same, warrant this Court granting the writ, particularly in light of the proliferation of decisions that blatantly ignore the rulings of this Court in this area.

B. CERTIORARI SHOULD BE GRANTED TO ALLOW THIS COURT TO ADDRESS A FACIAL OVERBREADTH CHALLENGE TO AN ANTI-NUDITY REGULATION, A MATTER LEFT UNRESOLVED BY *BARNES*, SPECIFICALLY IN THE CONTEXT OF A "SECONDARY EFFECTS" ANALYSIS – A LEGAL DOCTRINE QUICKLY SPINNING OUT OF CONTROL.

Part of the problem that lower courts have had in attempting to decipher a constitutional holding from *Barnes* stems from the fact that the challenge there was limited to an "as applied" attack; the potential facial overbreadth of the Indiana statute not having been at issue before the Court. *Barnes*, 501 U.S. at 585 (Souter, J., concurring). This has resulted in inferior tribunals guessing as to how this Court would ultimately resolve such a challenge, which has in turn engendered such an expansive interpretation of the secondary effects doctrine to where that concept now can be used to preclude not only the non-verbal communication expressed through nude and semi-nude performance dance entertainment but, in apparent contradiction to the overbreadth doctrine, ***to pure verbal speech as well.***

In *Colacurcio*, the Ninth Circuit addressed the constitutionality of a city ordinance which required exotic dancers to maintain a ten foot distance from patrons while performing. In rejecting an argument that a lesser

buffer distance (four feet) would equally further the governmental interest of prohibiting impermissible sexual contact between an entertainer and a patron, the court noted that this option "would permit ***verbal communication*** between dancers and patrons, thereby failing to curtail ***propositions*** for drugs or sex." 163 F.3d at 554 (emphasis added). More specifically, the Ninth Circuit observed that while a four-foot distance would keep patrons and dancers out of ***arm's reach***, "a ten-foot requirement covers two arms spans ***and keeps patrons out of earshot***." *Id.* (emphasis added).

If Justice Souter's "secondary effects" opinion is the constitutional holding of *Barnes*, it is interesting to compare these comments with the opinion of the Justice as to why the Indiana statute did not violate the "narrow tailoring" component of the *O'Brien* test. Specifically, Justice Souter concluded that as far as the record there was concerned, the entertainers were not limited by anything short of the obscenity laws "from expressing an erotic message by ***articulate speech*** or representational means." 501 U.S. at 587 (emphasis added).[15]

Thus, the pure verbal speech that Justice Souter appears then to contend is necessary in order for an anti-nude dancing regulation to pass scrutiny under *O'Brien*, can now also be precluded based upon an expansive interpretation of the secondary effects doctrine that inferior courts have read into his *Barnes* concurrence. This drastic expansion of the secondary effects doctrine

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[15] *Accord, Ranch House, Inc. v. Amerson*, 22 F. Supp.2d 1296, 1306 (N.D. Ala. 1998) (the court noting that to offset any diminished impact of the erotic message resulting from a requirement that entertainers wear certain clothing, "the dancers can perhaps supplement their gyrations ***with talk which can further convey their intended erotic message***") (emphasis added).

beyond the bounds as even contempuated by Justice Souter warrants this Court granting the writ, particularly in light of the fact that some courts now believe that "secondary effects" can trump the overbreadth doctrine by permitting the government to entirely preclude ***any*** verbal communication between two individuals. And, *Pap's* will not resolve this issue. While overbreadth was raised, 719 A.2d at 276, the case was decided on other grounds.

In addition, review should be granted because the Sixth Circuit ruling here and other similar holdings demonstrate that adherence to Justice Souter's analysis in *Barnes* leads to judicial decisions that make a mockery of both the overbreadth and the secondary effects doctrines.

Farkas v. Miller, 151 F.3d 900 (8th Cir. 1998), was the Eighth Circuit's foray into *Barnes*. There, the court was confronted with an Iowa statutory amendment that precluded certain forms of nudity not just in alcohol establishments as had been the case in the past, but in all businesses "required to obtain a sales tax permit."[16] *Id.* at 901-02. The Eighth Circuit concluded that the statute passed muster under Justice Souter's concurrence in *Barnes*, *id.* at 904-06, and rejected the plaintiffs' overbreadth challenge because it found that a statutory "theatrical performances" exception[17] "appropriately limits the reach of the restrictions ***to the type of adult entertainment that is associated with harmful secondary effects.***" *Id.* at 905 (emphasis added).

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[16] The Eighth Circuit never explains how businesses required to obtain a sales tax permit are associated with secondary effects.

[17] "The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances. . . . " 151 F.3d at 902.

After the ruling of the district court, Mr. Farkas continued to permit nude dancing at his "adult" establishment and was prosecuted in state court for violating the Iowa statute, as was a gentlemen by the name of Jeffery Marshall. In pre-trial motions, the court ruled in both cases that it was the government's burden to establish that the defendants did ***not*** fall within the "theatrical performances" exception. App. 297-98, 304; App. 308-09, 312.

Mr. Marshall's trial went forward first, where he was acquitted in a bench trial when the court held the evidence insufficient for a rational trier-of-fact to conclude that the adult entertainment establishment at issue there was not a theater as that term was used in the statute. App. 313-21. The state then moved to dismiss the charges against Mr. Farkas predicated upon its belief that an acquittal of Mr. Farkas was preordained. App. 322-24. The state court agreed. App. 325.

Accordingly, even though the Eighth Circuit concluded that the statute was not overbroad because it was limited to Mr. Farkas' type of adult entertainment establishment, the state trial court had already concluded that Mr. Farkas' business did not, in fact, fall within the purview of the statutory prohibitions. The Defendants here have similarly acknowledged that these Petitioners ***may*** in the appropriate circumstances fall within the Ch. 542 theatrical exception. App. 326-27. If then as occurred in *Farkas* and if as intimated by the State of Tennessee here, "adult" businesses are not subject to these prohibitions, the secondary effects analysis used by a number of these courts in regard to anti-nudity laws, including the Sixth Circuit here, makes no rational sense.

This is particularly true in light of the belief by courts that follow Justice Souter's approach that such legislation can pass an overbreadth challenge only by containing an exception for "legitimate" nude expression. *See, e.g., Triplett Grille*, 40 F.3d at 136; and the decision of the Sixth

Circuit here at App. 9-10. The regulation at issue in *Pap's* contains no such provision, and review of this case should therefore be granted to address this fundamental question and to provide needed guidance to inferior courts.

Such review will also permit this Court to address two fundamentally related, but unresolved, questions. First, can a regulation like Tennessee's which prohibits some from dancing nude while permitting others to freely engage in such conduct, pass muster under the Equal Protection Clause? Second, can the government reduce the level of constitutional protections afforded to live entertainment below the obscenity standard, to where such conduct can now be criminalized solely on the basis that it lacks "serious artistic merit"? The Sixth Circuit answers this latter question in the affirmative (App. 8), yet this does not seem to comport with the precedent of this Court. *See, Reno v. A.C.L.U.*, 521 U.S. ___, 138 L.Ed.2d 874, 898-99 (1997) (law which attempted to distinguish between criminal and permitted expression only on the basis of one prong of the obscenity test in *Miller v. California*, 413 U.S. 15 (1973), was unconstitutional). Analysis of a facial challenge to Ch. 542 will also permit this Court to review the vagueness concerns of the statute referenced, *supra*.

Certiorari should also be granted to ensure that the potential misapplication of Justice Souter's concurrence in *Barnes* does not eviscerate ***general*** public indecency laws that exist in virtually every jurisdiction throughout this country. The Sixth Circuit in *Triplett Grille* concluded that the position of the three member plurality opinion in *Barnes* authored by the Chief Justice (that the government's interest in protecting the morality of society was a sufficient justification for upholding such a law) "did not win majority support." 40 F.3d at 133. It therefore ***rejected***

"morality" as a "proper basis for limiting the freedom of speech. . . . " *Id. Accord, Farkas*, 151 F.3d at 904.[18]

Carried out to its logical conclusion, then, those courts rejecting the Chief Justice's plurality opinion as the holding in *Barnes* would be required to hold that the government cannot ban nudity occurring on, for example, a public street (whether expressive or not), because such conduct is not associated with the secondary effects of adult entertainment. Certainly, that could not have been the intent of any member of this Court in *Barnes* – Justice Souter included. And, more than likely, this anomalous reasoning by the lower courts is a function of the fact that *Barnes* was decided only on an "as applied" challenge limited to the context of "adult entertainment," where the rejection of morality as being a sustaining governmental interest would make some logical sense. Certiorari should then be granted to examine this issue particularly in light of a facial challenge (which may well again escape analysis in *Pap's)*, so that lower courts have appropriate guidance when evaluating the constitutionality of such laws in all contexts; not just in regard to "adult" entertainment.

C. CERTIORARI SHOULD BE GRANTED TO EXAMINE WHETHER THE LONE OPINION OF JUSTICE SOUTER IN *BARNES* HAS SO FUNDAMENTALLY ALTERED THE "SECONDARY EFFECTS" DOCTRINE THAT THE CONSTITUTIONAL LIMITATIONS OF THAT THEORY AS ESTABLISHED IN *RENTON* NO LONGER APPLY.

In *Renton*, now-Chief Justice Rehnquist observed for the Court that in the context of the secondary effects

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[18] *See also, Lounge Management, Ltd.*, 580 N.W.2d at 164 (the court's analysis of the ordinance at issue "cannot be dependent upon a personal view of the propriety or morality of the activities offered at the plaintiff's establishment").

doctrine announced in that decision, the zoning regulation at issue was not unconstitutional as "the First Amendment requires only that Renton refrain from ***effectively denying*** respondents a ***reasonable opportunity to open and operate an adult theater*** within the city, and the ordinance before us easily meets this requirement." 475 U.S. at 54 (emphasis added). Recent appellate pronouncements, however, signal that the secondary effects doctrine has been so expanded that this constitutional limitation no longer applies.

Here, the secondary effects doctrine can now be used to alter the expression itself to the extent that a business is no longer permitted to operate as an "adult" establishment. More importantly, while the Sixth Circuit has concluded that a business owner is not even entitled to attempt to disprove the existence of negative by-products emanating either from the establishment or the expression disseminated therein, the Fourth Circuit has very recently taken the exact opposite approach, and in what is certainly the penultimate extension of the secondary effects doctrine, has now commanded that "adult" businesses can be precluded from ***ever*** opening for business, ***unless and until they specifically prove*** (although the court gives no hint as to how) that they will ***not*** engender any form of secondary effects. *Steakhouse, Inc. v. The City of Raleigh*, 166 F.3d 634 (4th Cir. 1999).

Specifically, the court in *Steakhouse* upheld a regulation that ***required*** a potential adult business to ***prove prior to opening***, that it will not "adversely affect" certain public services, such as police, and that its "secondary effects" will not "adversely affect adjacent properties." *Id.* at 636. Accordingly, while the Sixth Circuit here concludes that an adult facility is not even entitled to refute the incantation by the government of "secondary effects," the Fourth Circuit has at virtually the same time held that an adult establishment ***must*** disprove its connection to

secondary effects, or else it can be constitutionally precluded from ever opening; a result seemingly prohibited under *Renton*.

These recent extensions of the secondary effects doctrine by lower courts are alarming for another reason as well. The decisions do not merely apply to "adult" entertainment in the form of nude or topless dancing. They now even apply to ***clothed*** performance dance entertainment. *See, Steakhouse, Inc.*, at 636 n.1 (the ordinance defining "adult establishment" to include any business featuring "go-go dancers"); and *Colacurcio*, 163 F.3d 545 (excerpts of the Kent city code at issue there are found at App. 344-45, and establish at § 5.10.030 that the distance regulation applied to any entertainment where less than a full bikini – covering both breasts and fully covering the buttocks – was worn).

This extension of the secondary effects doctrine illustrates the fundamental legal issue underlying this petition; the question of what level of constitutional protection attaches to erotic performance dance entertainment – whether clothed or not. In *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 70-71 (1976), Justice Stevens, on behalf of only a plurality of four justices, took the position that "sexually explicit" entertainment may well receive lower constitutional protections than "core" political speech. However, such a position has never commanded majority approval of this Court, Justice Stevens subsequently dissented in *Barnes*, and as recently as 1994 in *United States v. X-citement Video, Inc.*, 513 U.S. 64 (1994), only Justices Scalia and Thomas specifically noted adherence to that position. 513 U.S. at 80 (Scalia, J., dissenting). *Cf., id.* at 72 (majority noting constitutional protections for non-obscene "sexually explicit" materials). Yet, the appellate decisions discussed, *supra*, not only hold this *Young* plurality theory of ***"sexually explicit"*** entertainment receiving lower constitutional protections to now be

doctrine,[19] but they have then extended it to mere nude dancing, then to topless dancing, and now to *clothed* dancing. This rapid and uncontrolled expansion of the secondary effects doctrine warrants review by this Court.

D. CERTIORARI SHOULD BE GRANTED TO EXAMINE WHETHER, BASED UPON A FULL EVIDENTIARY RECORD, PRECLUDING THE NUDITY COMPONENT OF EROTIC PERFORMANCE DANCE ENTERTAINMENT SUBSTANTIALLY DILUTES THE EXPRESSIVE MESSAGE SOUGHT TO BE CONVEYED.

In *Barnes*, the three member plurality opinion authored by the Chief Justice concluded that requiring dancers to wear pasties and a G-string "does not deprive the dance of whatever erotic message it conveys . . . ". 501 U.S. at 571. Justice Souter was less certain as to the effect on communication. "Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree." 501 U.S. at 587.

Yet, that issue was never factually adjudicated in *Barnes*. The first decision of the Seventh Circuit remanded for the district court to determine whether or not the entertainment to be engaged in by the plaintiffs there was expression entitled to protection under the First Amendment. *Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989). The district court determined that it was ***not*** (contrary to this Court's ultimate holding). In its second decision, the Seventh Circuit reversed that holding of the district court as well. 904 F.2d 1081 (7th Cir. 1990) (en

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[19] *See, e.g., Richland Bookmart*, 137 F.3d at 438. *But Cf., Colacurcio*, 163 F.3d at 549-550 (noting that a majority of this Court has never held "sexually explicit but non-obscene speech" to enjoy less than full First Amendment protection), *citing* Tribe, *American Constitutional Law* §§ 12-18, p. 938 (2d Ed. 1988).

banc). No evidence was ever presented to the district court, one way or the other, as to whether requiring entertainers to "cover-up" deprived the expression of its erotic message. Nor is there such an evidentiary record now before this Court in *Pap's*.

Here, however, Plaintiffs presented substantial evidence in regard to the effect of clothing on this mode of expression, including expert witness affidavits and extensive objective studies undertaken to evaluate just this issue. App. 171-236. Yet, neither the district nor circuit court opinions discussed this evidence or evaluated Plaintiffs' arguments in this regard. The refusal of the Sixth Circuit to permit the Plaintiffs to litigate this issue must be placed in context with another of its decisions that held that the one thing on which a majority of the Court in *Barnes* clearly agreed – the fact that nude performance dance entertainment was entitled to First Amendment protections – is still open to debate.

In *Barnes*, the plurality concluded that "nude dancing ***of the kind sought to be performed here*** is expressive conduct within the outer perimeters of the First Amendment. . . . " *Barnes*, 501 U.S. at 566 (emphasis added). *Accord*, *id.*, at 581 (Souter, J., concurring in the judgment) ("Such is the expressive content of the ***dances described in the record***") (emphasis added).

That "record" included the affidavit of Gayle Ann Marie Sutro which the undersigned submitted on behalf of three of the *Barnes* respondents. *See* Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 90-26, at App. 3-5 thereto, and fully reproduced here as App. 346-48. Ms. Sutro's statement in regard to her performances was succinct: "My nude dance performances are appropriately choreographed and are an attempt to communicate as well as to entertain." App. 347, ¶10. It was upon this statement, and this statement alone, that this Court held as constitutionally protected the performance

dance entertainment engaged in by Ms. Sutro, Carla Johnson, and Glen Theatre, Inc.[20]

When confronted with the conclusion reached by a district court that erotic dancing is expressive activity ***as a matter of law***, the Sixth Circuit responded by concluding that "[w]e read *Barnes* differently." *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 408 (6th Cir. 1997). Specifically, it "reads" Justice Souter's concurring opinion to hold that "on a different record, some activities may be considered not to be expressive at all," and that it is "appropriate to determine whether speech is implicated on a case-by-case basis ***as a question of fact***." *Id.* at 409 (emphasis added).

This position appears clearly at odds with the holding of eight members of this Court in *Barnes*, and with Justice Souter's recent dissent in *N.E.A. v. Finley*, 524 U.S. ___, 141 L.Ed.2d 500 (1998), where he noted that the constitutional protections of performance entertainment turn not on the messages that they convey, but "simply on their expressive character . . . ." 141 L.Ed.2d, at 526 (Souter, J., dissenting). The trend of the Sixth Circuit to ignore even this most basic tenant of *Barnes* illustrates that review of its approach to this area of constitutional adjudication is warranted.

Finally, courts such as the Sixth Circuit which adopt Justice Souter's concurrence in *Barnes* leave two fundamental questions unanswered. First, if nudity is so important for "legitimate expression" so as to ***require*** a statutory exception in order to survive a First Amendment attack, why is nudity then so inconsequential in regard to the entertainment at issue? Second, if – as explained by the Sixth Circuit in *DLS* – the government can relitigate the issue on a case-by-case ***factual*** basis of

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[20] Darlene Miller, represented by other counsel, had submitted a videotape of her performances and was further deposed.

whether certain forms of dance are sufficiently imbued with expressive elements so as to merit constitutional protection, should not a proponent of such speech also be entitled to litigate, on a case-by-case basis, whether prohibiting the component of nudity robs the dance performance of its communicative attributes? Granting the writ would allow this Court to address these questions based on a full factual record, which will not be possible by review of *Pap's* alone.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant the requested writ.

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APPENDIX

"A"

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 96-6512, 96-6573, 97-5924, 97-5938

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: STATE OF TENNESSEE PUBLIC INDECENCY STATUTE.

DEJA VU, et al.,

Plaintiffs-Appellants,

v.

METRO GOVERNMENT, et al.,

Defendants-Appellees.

/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

(Filed Jan. 13, 1999)

BEFORE: MARTIN, Chief Judge, NORRIS and BATCHELDER, Circuit Judges.

PER CURIAM. Various dancers, managers, or owners engaged in the exhibition of nude and/or semi-nude dancing in Tennessee challenge the district court's grant of summary judgment to local and state governing bodies and officials in their actions alleging the Tennessee Public Indecency Statute, Chapter 542, violates the United States Constitution. We hold that Chapter 542 does not restrict speech based on a disagreement with the message it conveys in violation of the Constitution, but is instead aimed with adequate precision at combating secondary crime effects. We therefore affirm the district court.

On July 1, 1994, the Tennessee state legislature passed Chapter 542 of the Public Acts of 1994. Tenn. Code Ann. § 39-13-511 (Supp. 1995). Chapter 542 prohibited

certain forms of public nudity and other conduct related to public indecency. Two weeks prior, on June 14, Plaintiffs Deja Vu of Nashville, Inc., et al., had sought to enjoin enforcement of Chapter 542 in the United States District Court for the Middle District of Tennessee. This motion for preliminary injunction and temporary restraining order was denied on July 1. On that same day, plaintiffs from Memphis filed suit in state circuit court against the city of Memphis, also challenging the constitutionality of Chapter 542. On July 21, their case was removed to the United States District Court for the Western District of Tennessee. On July 11, plaintiffs James Corbett Chick, et al., filed suit in state circuit court in Nashville, seeking to enjoin enforcement of Chapter 542. On July 18, the case filed by the Chick plaintiffs was removed, pursuant to defendants' motion, to the United States District Court for the Middle District of Tennessee.

On November 2, the Judicial Panel on Multidistrict Litigation transferred the Memphis plaintiffs' suit to the Middle District of Tennessee and consolidated it with the case filed by the Deja Vu plaintiffs. On January 5, 1995, the suit filed by the Chick plaintiffs was also consolidated with the above cases as a "tag-along action."

On September 27, DLS, Inc., et al. filed suit against the city of Chattanooga in the Eastern District of Tennessee, also seeking to enjoin Chapter 542's enforcement as well as Chattanooga City Code provisions that served to regulate public nudity. The Chattanooga plaintiffs' motion for summary judgment was denied on October 12. On April 11, 1996, the case was transferred to the Middle District of Tennessee and consolidated with the above-mentioned cases. Prior to this, on January 10, this Court

reversed the district court's July 1, 1994 denial of the Deja Vu plaintiffs' motion for a preliminary injunction or temporary restraining order and sent the case back to the district court. *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville*, 74 F.3d 1240, 1996 WL 11061 (6th Cir. Tenn. (Jan. 10 1996)) (unpublished opinion).

Cross-motions for summary judgment and/or to dismiss were filed by the parties and oral arguments on the motions were heard on March 25. On September 30, the district court granted summary judgment to the Deja Vu, Memphis, and Chick defendants, and dismissed the Chattanooga plaintiffs' claims.

On October 16, the plaintiffs filed a motion for stay pending appeal to continue the preliminary injunction entered by this Court. On July 2, the district court granted the motion for stay. All plaintiffs then filed timely notices of appeal. On appeal, they have all adopted and incorporated one another's arguments in regard to the constitutionality of Chapter 542.

This Court reviews a district court's grant of summary judgment *de novo*. *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1068 (6th Cir. 1998). Plaintiffs' principal contention is that Chapter 542 violates the First Amendment right to freedom of expression. The threshold determination in deciding if a statute complies with the First Amendment guarantee of freedom of expression is whether the statute is a content neutral time, place, and manner restriction or content based restriction and therefore subject to a strict scrutiny analysis and presumptively violative of the First Amendment. *See Boos v. Barry*, 485 U.S. 312, 321 (1988). Whether a statute that restricts

free speech is content neutral is largely resolved by determining whether the government enacted the statute because it disagrees with the message conveyed by the speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

The preamble to Chapter 542 plainly provides that Chapter 542 was enacted to combat the secondary effects of nude dancing establishments such as sexual assault, prostitution, and other criminal activity. "[C]ontrolling precedent establishes that the goals of crime and disease prevention are content-neutral." *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 (6th Cir. 1997) *(reh'g en banc denied)*. Because Chapter 542 is fueled by the motivation of curbing the associated criminal effects of nude dancing it is content neutral.

Having determined that Chapter 542 is content neutral, the focus now turns to the question of how to appropriately analyze the ordinance to determine its constitutionality. As stated by this Court in *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994), in order to determine whether a content-neutral statute violates the First Amendment guarantee of freedom of expression it is proper to follow Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In *Barnes*, Justice Souter adopted the four-part test developed in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which provides that a statute is constitutionally valid if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

restriction on First Amendment freedom is no greater than is essential to the furtherance of that interest.

Justice Souter asserted that, in applying the four-part *O'Brien* test, a governmental interest in enacting the statute to combat associated criminal activity will serve to meet the four prongs and, in turn, justify enforcing the ordinance. *See Barnes*, 501 U.S. at 583. This is not to say, however, that affirmative evidence of a secondary effects motivation is necessary. *See Triplett Grille, Inc.*, 40 F.3d at 135. The "appropriate focus" is instead "the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes*, 501 U.S. at 582 (citing *McGovern v. Maryland*, 366 U.S. 420 (1961)).

Turning to the first prong of the *O'Brien* test with this reasoning in mind, plaintiffs claim that enactment of Chapter 542 was not within the constitutional power of the State of Tennessee. However, prevention of offenses such as sexual assault, prostitution, and other crime-related activity does fall within the constitutional power of the state. *See Barnes*, 501 U.S. at 583. As the deterrence of such evils is precisely the goal of Chapter 542, it therefore easily meets the first prong of *O'Brien*.

The second prong addresses whether the statute furthers an important or substantial government interest. *See O'Brien*, 391 U.S. at 377. While prevention of crime is doubtless a substantial government interest, a question arises whether Chapter 542 does, in fact, further that interest. Plaintiffs contend that Chapter 542 does not state with specificity the impact it will have and therefore lacks the appropriate designation of how it will prevent crime.

However, as provided in *Renton*, the government is not required to produce research that identifies the exact causation between the restricted activity and the targeted secondary effects. *Id.* at 51. The type of restricted activity present in Chapter 542 is nearly identical to that in *Barnes*. And, as Justice Souter provided in his concurring opinion in *Barnes*, it does not require a "leap" to surmise that entertainment such as totally nude dancing is "likely to produce the same pernicious secondary effects as the adult films . . . at issue in *Renton*." *Barnes*, 501 U.S. at 584. Chapter 542 therefore adequately furthers the government interest of preventing crime associated with nude dancing establishments and accordingly meets the second prong of the four-prong *O'Brien* test.

Satisfying the third prong of *O'Brien* is accomplished via answering the above discussion regarding Chapter 542's content neutrality. Determining content-neutrality is akin to determining whether the statute is unrelated to the suppression of free expression. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). As Chapter 542, as discussed above, is content-neutral, the third prong is also met.

The fourth and final prong under an *O'Brien* analysis, whether the restriction is no greater then [sic] necessary to further the government interest, can again be analyzed within the context of Justice Souter's concurrence in *Barnes*. As in *Barnes*, Chapter 542, while moderating expression to some extent by disallowing certain forms of public nudity, still allows for considerable "capacity and opportunity to express the erotic message." *Id.* at 587. The

fourth prong of the *O'Brien* test is therefore met. It follows that because Chapter 542 is a content-neutral restriction on free speech that meets all four prongs of the *O'Brien* test and thereby comports with the tenets of *Barnes*, it does not violate the First Amendment right to freedom of expression.[1]

The Chattanooga plaintiffs attempt to differentiate their case from the other plaintiffs' when attacking Chapter 542 on freedom of expression grounds. They argue that because they are also subjected to a Chattanooga City Ordinance that, unlike Chapter 542, has a six-foot buffer zone restriction (via Judge Boggs's decision in *DLS, Inc.*, 107 F.3d at 403), and forbids alcohol consumption, Chapter 542 no longer combats any link between the nude dancing at their clubs and secondary crime effects. This argument ignores the seminal point that, while the possibility of disease may be diminished due to an increased distance between dancer and patron and that a lack of alcohol may reduce violence, the associated crime effects still exist. The Chattanooga plaintiffs do not enjoy a more formidable challenge to Chapter 542's constitutionality.[2]

---

[1] Plaintiffs also alleged that Chapter 542 violates the Tennessee Constitution's guarantee of free communication. However, the Tennessee Constitution does not provide any greater protection for nude dancing as a form of expression, and therefore is subjected to the same analysis as for the United States Constitution. It is therefore also not violated by Chapter 542.

[2] The Chattanooga plaintiffs also challenged the constitutionality of Chattanooga City Ordinance § 25-85 and § 11-435(c) on the same grounds that Chapter 542 was

All plaintiffs further maintain that Chapter 542 is void for vagueness. An ordinance is void for vagueness if a person of ordinary intelligence cannot reasonably interpret what is prohibited. *Grayned*, 408 U.S. at 108. Plaintiffs point specifically to Chapter 542's inclusion of "theatrical production" as an activity exempt from its prohibitions. Although a definition is not provided for "theatrical production," the district court correctly concluded that this exception was not vague because it derives its definition via reference to the Tennessee Obscenity Statute. Tenn. Code Ann. § 39-17-9. Any confusion is further cleared up by applying the obscenity standard for theatrical productions as provided in *Miller v. California*, 413 U.S. 15 (1973).

Plaintiffs add that the "theatrical production" exception's reference to "serious artistic merit" renders it vague. They contend specifically that this phrase does not comply with the three-prong obscenity standard as provided in *Miller* because *Miller* refers to "serious value" as opposed to Chapter 542's reference to "serious artistic merit." In responding to such an analogy it must be kept in mind that for a statute to be vague it must contain "terms so vague that men of common intelligence must necessarily guess at its common meaning." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). The lack of exact uniformity between the two phrases certainly does not require such guess-work and the exception is therefore not vague.

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challenged by all plaintiffs. However, as correctly stated by the district court, the Chattanooga City Ordinance and Chapter 542 essentially mirror one another. Therefore these claims of unconstitutionality likewise fail.

In asserting that Chapter 542 is vague, plaintiffs also refer to the provided definition of "public place" as well as for the listed exceptions such as for modeling classes, family-oriented clothing-optional facilities, and temporary premises used as private residence. However, when the meaning of a word or phrase is commonly understood, a statute's failure to define the term will not render the statute void for vagueness. *See United States v. J.T. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). The statute need not define with mathematical precision the conduct forbidden. *See Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. 1995). Chapter 542's terms comply with this minimum degree of definiteness and therefore do not render it unconstitutionally vague.[3]

Plaintiffs argue that Chapter 542 is also overbroad. A statute is overbroad when there exists "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Triplett Grille, Inc.*, 40 F.3d at 135 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 801 (1984)). In *Triplett*, this Court did strike down an ordinance under the First Amendment overbreadth doctrine because it banned "all public nudity, including live performances with serious literary, artistic, or political value." *Id.* at 136. It included no limiting provisions and swept "within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other

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[3] Chapter 542 even lists extensive examples of what is meant by "public place."

crimes." *Id.* Absent such limitations, much of the prohibited conduct did not properly provide a link to the associated harmful effects. Chapter 542 avoids such an overbreadth problem by containing these very limitations and exclusions the plaintiffs claim render Chapter 542 vague. Chapter 542 therefore does provide a bridge between the banned activity and the secondary effects.[4]

The district court's grant of summary judgment to the defendants is affirmed.

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[4] Plaintiffs additionally contend that Chapter 542 violates the Equal Protection Clause and the substantive Due Process Clause. U.S. Const. amend. XIV. These arguments also fail. Chapter 542 does not, by creating the above-mentioned exemptions, establish a "suspect class" based on a distaste for the form of expression in violation of the Equal Protection Clause. The exemptions instead serve to evince that Chapter 542 only targets nudity that yields an association with secondary crime effects. *See DLS, Inc.*, 107 F.3d at 411. Chapter 542 also does not violate the Due Process Clause as it makes clear all of the elements necessary for an employer to be held liable for the conduct of his employees. Although Chapter 542 does not contain the specific phrase "within the scope of employment" it does include the phrase "while working as an employee." It therefore provides fair warning to employers regarding their liability. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

APPENDIX

"B"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION,	))))	MDL Docket No. 1031 All Cases Judge Echols

MEMORANDUM

Pending before the Court are a number of summary judgment motions and/or motions to dismiss filed in the original case, *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, No. 3-94-0494 (M.D. Tenn. filed June 14, 1994), and in other similar cases which have been transferred to this Court under 28 U.S.C. § 1407, which provides for consolidation in multidistrict litigation. The cases designated for disposition under this multidistrict litigation, together with the pending Motions are listed below:

(1) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0494, *Deja Vu of Nashville, Inc., et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.;* Docket Entry No. 30);

(2) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0571, *James Corbett Chick, d/b/a The Brass Stables, C & A Entertainment, Inc., and Dawn Pierce v. The Metropolitan Government of Nashville Davidson County, Tennessee, and Robert E. Kirchner, Jr.;* Docket Entry No. 18);

(3) Motion by Defendants to Dismiss for Failure to State a Claim or in the Alternative for Summary Judgment (originally filed in case number 3-94-0990, *Steve Cooper, et al. v. City of Memphis, et al.;* Docket Entry No. 0);[1]

(4) Motion by Defendant City of Memphis for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 26);

(5) Motion by Defendants Weakley County and Sheriff Michael A. Wilson for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 27);

(6) Motion by Plaintiffs Steve Cooper, Ralph Lunati, Entertainment U.S.A. of Tennessee, Sherrod Jackson, Pure Passion, Inc., and Southern Entertainment Management Co. (collectively referred to as "Memphis Plaintiffs") for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 35);

(7) Motion by Plaintiffs Deja Vu of Nashville, Inc., John Christopher Cox, Good Times, Inc., Bob Pope, Denise Benson, and Delaina A. Caise (collectively referred to as "Deja Vu Plaintiffs") for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 40);

(8) Motion by Plaintiffs James Corbett Chick, d/b/a The Brass Rail Stables, C & A Entertainment, Inc., and

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[1] Defendants' Motion was originally filed in the Western District of Tennessee in case number 94-CV-2590. The docket entry number assigned to Defendants' Motion in that case was Docket Entry No. 25.

Dawn Pierce (collectively referred to as "Chick Plaintiffs") for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 44);

(9) Motion by Plaintiffs James Green, d/b/a Doll House and Lee McDerman, d/b/a Treasures (collectively referred to as "Jackson Tag-Along Plaintiffs") for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 45);

(10) Motion by Defendants City of Chattanooga, Tennessee; Mayor Gene Roberts; City Council of Chattanooga; Chairperson Mai Bell Hurley; Councilpersons Don Eaves, David Crockett, David Distefano, Yusef Hakeem, John Lively, Leamon Pearce, Marti Rutherford, and Ron Swafford; Chief of Police Ralph Cotran; City Attorney Randall Nelson; Safety Administrator Ervin Dinsmore; and Tennessee Attorney General Charles W. Burson (collectively referred to as "Chattanooga Defendants") to Dismiss (originally filed in case number 3-96-0372; Docket Entry No. 21).

Also pending are the following other Motions in the cases identified:

(1) Motion by Deja Vu Plaintiffs to Amend Complaint (filed, in case number 3-94-MD-1031; Docket Entry No. 70);

(2) Motion by Chick Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 76);

(3) Motion by Deja Vu Plaintiffs for Additional Time to File Responsive Affidavit of Dr. Edward Donnerstein

(filed in case number 3-94-MD-1031; Docket Entry No. 79);

(4) Motion by Chick Plaintiffs to Amend Complaint (Chick Plaintiffs' "Second Motion to Amend Complaint") (filed in case number 3-94-MD-1031; Docket Entry No. 84);

(5) Motion by Deja Vu Plaintiffs to Strike and Notice of Objection as to Certain Matter (filed in case number 3-94-MD-1031; Docket Entry No. 71).

I. PARTIES

Plaintiffs are various purveyors of nude and/or semi-nude dancing in Tennessee, either as dancers, managers, or owners of clubs where such dancing occurs. Defendants are various local and state governing bodies and government officials. Plaintiffs challenge the constitutionality of a recent state statute creating a new offense of public indecency, Chapter 542 of the Public Acts of 1994 ("Chapter 542"), under both the Constitution of the State of Tennessee and the United States Constitution.

II. PROCEDURAL HISTORY

The original case was filed by Deja Vu Plaintiffs on June 14, 1994, in the United States District Court for the Middle District Of Tennessee. Deja Vu Plaintiffs first sought a preliminary injunction, seeking to enjoin enforcement of Chapter 542, codified at § 39-13-511 of Tennessee Code Annotated, which became effective on July 1, 1994. This Court denied Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order

on July 1, 1994. Deja Vu Plaintiffs filed an appeal of that decision with the United States Court of Appeals for the Sixth Circuit on July 28, 1994. Several other plaintiffs then filed suit in other state and federal courts challenging the constitutionality of Chapter 542 under both the Tennessee and United States Constitutions.

Memphis Plaintiffs filed suit challenging the constitutionality of Chapter 542 on July 1, 1994, in state circuit court in Memphis, Tennessee. The case was removed by Defendants City of Memphis and Melvin E. Bibbs to the United States District Court for Western District of Tennessee on July 21, 1994.

Chick Plaintiffs filed suit on July 11, 1994 in state circuit court in Nashville, Tennessee, seeking to enjoin enforcement of Chapter 542 as violative of both state and federal constitutions. Defendants removed the case to the United States District Court for the Middle District of Tennessee on July 18, 1994. On that same date, Defendants moved to consolidate this case with the case filed by Deja Vu Plaintiffs. On July 19, 1994, Plaintiffs amended their Complaint to delete all references to their federal constitutional claims and moved to remand the case back to state court for adjudication on the remaining state law claims. On July 27, 1994, the Court denied the Plaintiffs' Motion to Remand, finding that it would be more convenient for the defendants and courts involved in these cases for the Court to retain this case and resolve it along with the case filed by Deja Vu Plaintiffs.

On November 2, 1994, the Judicial Panel on Multidistrict Litigation ordered that the case filed by Memphis

Plaintiffs "be transferred to the Middle District of Tennessee and, with consent of that Court, assigned to the Honorable Robert L. Echols for coordinated or consolidated pretrial proceedings" with the case filed by Deja Vu Plaintiffs. *In re State of Tennessee Public Indecency Statute Litigation,* MDL 1031 (J.P.M.L. filed November 8, 1994). The case filed by Chick Plaintiffs was then consolidated with the above multidistrict case ("MDL 1031") as a "tag-along action" on January 5, 1995.

On May 3, 1995, Plaintiff Lee McDerman filed suit against Defendants Weakley County and Michael A. Wilson in the United States District Court for the Western District of Tennessee. On that same date, Jackson Tag-Along Plaintiffs filed suit in the United States District Court for the Western District of Tennessee. By Order of the Judicial Panel on Multidistrict Litigation dated July 17, 1995, those cases were then transferred and filed in the United States District Court for the Middle District of Tennessee and made a part of MDL 1031 on August 2, 1995.

On September 27, 1995, Chattanooga Plaintiffs filed suit in the United States District Court for the Eastern District of Tennessee, seeking to enjoin the enforcement of Chapter 542 and various Chattanooga City Code provisions regulating adult-oriented establishments as violative of the state and federal constitutions. On October 12, 1995, the Honorable R. Allan Edgar denied Chattanooga Plaintiffs' Motion for Preliminary Injunction. The Judicial Panel on Multidistrict Litigation then ordered that the case be transferred to the Middle District of Tennessee and made a part of MDL 1031 on April 11, 1996, for

ruling on the constitutionality of both Chapter 542 and the Chattanooga city ordinances.

On February 6, 1996, the Sixth Circuit rendered its decision on Deja Vu Plaintiffs' appeal of this Court's decision to deny them a preliminary injunction or temporary restraining order. Without elaboration, the Sixth Circuit reversed the decision of this Court, thereby granting Plaintiffs' a preliminary injunction enjoining the enforcement of Chapter 542.

The parties have now filed cross-motions to dismiss and/or for summary judgment.[2] The Court heard oral argument on these motions on March 25, 1996. As matters outside the pleadings, such as affidavits and other documents, have been presented to the Court, the motions will be treated as ones for summary judgment pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

III. TENNESSEE PUBLIC INDECENCY STATUTE

The new Tennessee statute which is the center of this storm of controversy was passed by the state legislature and became effective on July 1, 1994. Chapter 542 amends the Tennessee public indecency statute, which is codified at Section 39-13-511. The statute, as now codified, provides as follows:

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[2] Although the parties have filed their own individual motions, many of them have merely adopted the arguments of their counterparts. Accordingly, this Memorandum will refer to "Plaintiffs" and "Defendants" without delineating the particular plaintiff or defendant that may have first articulated the argument being discussed unless reference to a particular party is necessary for clarity.

(a) (1) (A) A person commits the offense of public indecency who, in a public place, as defined in subsection (a) (2) (B), knowingly or intentionally:

(i) Engages in sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions or other ultimate sex acts;

(ii) Appears in a state of nudity; or

(iii) Fondles the genitals of such person or another person.

(B) A person does not violate this subdivision (a) (1) if such person makes intentional and reasonable attempts to conceal such person from public view while performing an excretory function, and such person performs such function in an unincorporated area of the state.

(2) As used in subdivision (a)(1):

(A) "Nudity" or "state of nudity" means the showing of the bare human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of the areola, or the showing of the covered male genitals in a discernibly turgid state. "Nudity" or "state of nudity" does not include a mother in the act of nursing the mother's baby; and

(B) "Public place" means any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. "Public

places" include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not-for-profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal, or similar organizations. Premises used solely as a private residence, whether permanent or temporary, in nature shall not be deemed to be a public place. "Public places" does not include enclosed single sex public restrooms, enclosed single sex functional showers, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctors' offices, portions of hospitals and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor does it include a person appearing in a state of nudity in a modeling class operated by a proprietary school, licensed by the state of Tennessee, a college, junior college, or university supported entirely or partly by taxation, or a private college or university where such private college or university maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation or an accredited private college. "Public place" does not include a private

facility which has been formed as a family-oriented clothing optional facility, properly licensed by the state.

(3) Public indecency is punishable as follows:

(A) A first or second offense is a Class B misdemeanor punishable only by a fine of five hundred dollars ($500); and

(B) A third or subsequent offense is a Class A misdemeanor punishable by a fine of one thousand five hundred dollars ($1,500) or confinement for not more than eleven (11) months and twenty-nine (29) days, or both.

(4) (A) If a person is arrested for public indecency while working as an employee or a contractor, the employer or principal may be held liable for a fine imposed by this subsection.

(B) The employer may not be held liable under this section unless it is shown the employer knew or should have known the acts of their employee or contractor were in violation of this statute.[3]

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[3] This subsection was modified slightly by the Code Commission to correct grammatical errors pursuant to Section 1-1-108 of Tennessee Code Annotated. Chapter 542, as passed, provided as follows:

> If a person is arrested for public indecency while working as an employee or a contractor, the employer or principal may he held liable for a fine imposed by this Act.
>
> The employer may not be held liable under this section unless it is shown that the employer knew or

(5) The provisions of this subsection do not apply to any theatrical production which contains nudity as defined by this section performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit; provided, that such production is not in violation of chapter 17, part 9 of this title.

(6) This subsection shall not affect in any fashion the ability of local jurisdictions or the state of Tennessee to regulate any activity where alcoholic beverages, including malt beverages, are sold for consumption.

(b) (1) A person commits the offense of indecent exposure who, in a public place as defined in § 39-11-106(a)(29)[4] or on the private premises of another, or so near thereto as to be seen from such private premises:

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should have known *of* the acts of their employee or contractor *is* in violation of this statute.

S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994 (emphasis added).

[4] Section 39-11-106(a)(29) provides:

"Public place" means a place to which the public or group of persons has access and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, places of business, playgrounds and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place[.]

Tenn. Code Ann. § 39-11-106(a)(29) (1991).

(A) Intentionally:

(i) Exposes such person's genitals or buttocks to one (1) or more persons; or

(ii) Engages in sexual contact or sexual penetration as defined § 39-13-501; and

(B) Reasonably expects the acts will be viewed by another and such acts:

(i) Will offend an ordinary viewing person; or

(ii) Are for the purpose of sexual arousal and gratification of the defendant.

(2) "Indecent exposure," as defined in subdivision (b) (1), is a Class B misdemeanor, unless the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, in which event indecent exposure is a Class A misdemeanor.

Tenn. Code Ann. § 39-13-511 (Supp. 1995).

IV. REVERSE SEVERABILITY CLAUSE

It is important to note that Section 4 of Chapter 542 contains what is sometimes referred to as a reverse severability clause. It provides:

> If any provision of this act or the application thereof to any person or circumstance is held invalid, then all provisions and applications of this act are declared to be invalid and void.

S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994.

V. PLAINTIFFS' CONSTITUTIONAL CHALLENGES

Although all of the Plaintiffs do not challenge the constitutionality of Chapter 542 on the same grounds, their challenges may be generally categorized as follows. First, Plaintiffs argue that Chapter 542 violates their First Amendment right to freedom of expression under the United States Constitution. They also contend that Chapter 542 violates an analogous provision of the Tennessee Constitution, guaranteeing the state's citizens free speech. Second, Plaintiffs assert that Chapter 542 violates their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as it unfairly targets individuals who wish to assert their fundamental right to express themselves freely by dancing in the nude. Third, they contend that the employer liability provision of Chapter 542 violates the employers' right to due process as it does not properly identify the elements of the crime for which an employer may be held liable because of the actions of his or her employee. Fourth, Plaintiffs have contested the constitutionality of several provisions of Chapter 542 which create exceptions to liability under the Act. In other words, the exceptions recognized in Chapter 542 allow for public nudity in certain situations. Plaintiffs maintain that the exceptions are too vague or overbroad. Lastly, the Chattanooga Plaintiffs also request the Court to strike down the local Chattanooga city ordinances.

VI. SUMMARY JUDGMENT STANDARD

In ruling on a motion for summary judgment, this Court must construe the evidence produced in the light

most favorable to the non-moving party, drawing all justifiable inferences in his or her favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party may obtain summary judgment if the evidentiary material on file shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of satisfying the court that the standards of Rule 56 have been met. *See Martin v. Kelley*, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact which is disputed. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. If so, summary judgment dismissal is inappropriate.

VII. FREEDOM OF EXPRESSION

Plaintiffs first argue that Chapter 542 violates their First Amendment right to freedom of expression as inherent in the right to freedom of speech. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . . " U.S. Const., amend. 1. Plaintiffs assert that Chapter 542 is neither content-neutral nor a law of general applicability. Rather, it is law targeted at businesses that wish to provide adult-oriented entertainment. Plaintiffs contend that, because Chapter 542 is thus content-based, it may be upheld only if it is narrowly tailored to serve a compelling governmental interest through the least restrictive means.

The preamble to Chanter 542 reflects that the Tennessee legislature enacted the statute in response to the Supreme Court opinion in *Barnes v. Glen Theatre, Inc.*, 501

U.S. 560 (1991), in which the Court upheld a similar Indiana statute prohibiting nudity in public places. S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994. The Court in *Barnes* recognized that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Id.* at 566. The plurality opinion[5] then held that this activity, as expressive conduct, was subject to reasonable time, place, and manner restrictions. *Id.* Adopting the test developed in *United States v. O'Brien*, 391 U.S. 367 (1968), the plurality opinion states:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First

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[5] The plurality opinion was authored by Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy. Justices Scalia and Souter each wrote separate opinions concurring in the judgment.

> Amendment freedoms is not greater than is essential to the furtherance of that interest.

Barnes, 501 U.S. at 567 (quoting *O'Brien*, 391 U.S. at 376-77 (footnotes omitted)). The Court upheld Indiana's public indecency statute despite its incidental limitations on some expressive activity. *Barnes*, 501 U.S. at 567.

The five Justices who upheld the constitutionality of the Indiana public indecency statute at issue in *Barnes* offered three distinct rationales for doing so. Justice Scalia in a separate concurring opinion concluded that the statute implicated no First Amendment rights and was therefore subject only to the rational basis, which it easily passed. *Id.* at 572-81 (Scalia, J., concurring). The three Justices who joined in the plurality opinion, Justices Rehnquist, O'Connor, and Kennedy, applied the *O'Brien* test and upheld the statute reasoning that the statute was narrowly tailored to achieve the significant governmental interest of "protective societal order and morality." *Id.* at 567 (plurality opinion). Finally, in his concurring opinion, Justice Souter also applied the *O'Brien* test and upheld the statute because the substantial governmental interest at stake was limiting the secondary effects of public nudity, particularly as it arises in the adult-oriented entertainment industry. *Id.* at 580-83 (Souter, J., concurring). All five Justices, however, agreed that the statute was content-neutral, and thus could not trigger a strict scrutiny analysis. *Id.* at 570 (plurality opinion), 576 (Scalia, J., concurring), 582 (Souter, J., concurring).

Despite the holding of the Supreme Court in *Barnes*, Plaintiffs argue that Chapter 542 is distinguishable from the Indiana public indecency statute at issue in *Barnes* as

it is content-based rather than content-neutral, and therefore, this Court must analyze Chapter 542 under a strict scrutiny analysis. "The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 295 (1984)). In conducting this inquiry, courts look first at the face of the statute then at legislative intent. *Congregation Lubavitch v. City of Cincinnati,* 997 F.2d 1160, 1164 (6th Cir. 1993).

Plaintiffs contend that Chapter 542 is not content-neutral on its face because both the preamble and the exceptions listed in Chapter 542 demonstrate that it is targeted at establishments that provide nude dancing entertainment.[6] First, Plaintiffs argue that many sections

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[6] The preamble to Chapter 542 provides:

> WHEREAS, It is a lawful purpose of the General Assembly of the State of Tennessee to enact laws to protect and promote the general welfare, health, safety and morals of its citizens; and
>
> WHEREAS, The General Assembly is empowered to enact such laws pursuant to its charter and the general laws of the State of Tennessee; and
>
> WHEREAS, The Supreme Court of the United States has held that public nudity can be constitutionally proscribed, including so-called nude barroom dancing; and
>
> WHEREAS, The Supreme Court has found that a substantial governmental interest exists in protecting societal order and morality and that because of this

of the preamble to Chapter 542 specifically refer to nude dancing establishments and adult-oriented businesses.

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governmental interest, a law aimed at regulating public conduct, i.e., nudity, is constitutionally permissible despite its incidental impact on nude dancing; and

WHEREAS, The courts have found that nude dancing establishments are frequently used for unlawful sexual activities, including prostitution, and that such activity encourages prostitution, sexual assaults and attracts other criminal activity; and

WHEREAS, There is convincing documented evidence that sexually-oriented businesses including nude dancing establishments, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and

WHEREAS, It is recognized that sexually-oriented businesses including nude dancing establishments have serious objectionable operational characteristics thereby contributing to urban blight and downgrading the quality of life in the adjacent area; and

WHEREAS, The General Assembly desires to minimize and control the above mentioned adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the property values and character of surrounding neighborhoods; and deter the spread of urban blight; and

WHEREAS, The purpose or intent of this act is to regulate public conduct and the public commercial exploitation of sex, without any express or implied intent to suppress or prohibit any legitimate speech of expression.

S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994.

Thus, they argue that Chapter 542 was enacted to regulate those businesses in particular rather than public nudity in general.

A fair reading of the preamble to Chapter 542 as a whole, however, reveals that Chapter 542 was designed to address public nudity in general, which necessarily includes nude barroom dancing. In fact, the preamble to Chapter 542 is structured to track the *Barnes* decision, to which it specifically alludes.[7] Its premises encompass both the reasoning of the *Barnes* plurality opinion, which finds protecting societal order and morality a substantial governmental interest, and that of Souter's concurrence, which focuses on the secondary effects of nude dancing. With this language, the legislature has not inappropriately singled out nude dancing for proscription; rather, it has made an express effort to place Chapter 542 within the constitutional parameters established in *Barnes*. Therefore, the Court finds that the preamble to Chapter 542 does not render the Act facially unconstitutional as being content-based; in fact, it supports the Act's constitutionality.

The Court views the exceptions to Chapter 542 as compatible with this result. As noted by this Court in its earlier Opinion entered on July 1, 1994:

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[7] The preamble specifically provides:

> WHEREAS, The Supreme Court of the United States has held that public nudity can be constitutionally proscribed, including so-called nude barroom dancing[.]

S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994.

> The exclusions of modeling classes and for theatrical performances are consistent with the application of the Indiana statute in *Barnes*. In that case, the Court noted that Indiana had not enforced its public indecency law with regard to theatrical performances, ballets, and plays which contained nudity. Though Indiana's exceptions were not codified in the statute and arose through interpretation and application of the Indiana Supreme Court, the result of the lack of enforcement is the same. The Supreme Court, when it addressed the issue of constitutionality of the Indiana statute, did so understanding that the statute had not been applied and enforced against such performances. *See Barnes*, [501 U.S. at 590 (White, J., dissenting)]. Nonetheless, a plurality upheld the constitutionality of the statute as applied.

In fact, the inclusion of the theatrical performances exception may be necessary to avoid possible constitutional violations. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (holding that the denial of the use of a municipal facility for the production of a nude rock musical that the municipal board deemed to be not "in the best interest of the community" constituted a prior restraint in violation of the First Amendment because it did not provide the procedural safeguards necessary to obviate the dangers of censorship); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (invalidating statute as overbroad for failure to exempt "high-culture" entertainment from city's public indecency ordinance). Since the Supreme Court's holding in *Barnes*, a number of courts have upheld the constitutionality of public indecency statutes that have similar theatrical performance exceptions. *See, e.g., Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir.

1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1544 (1996); *Top Shelf v. Mayor & Aldermen for Savannah*, 840 F. Supp. 903 (S.D. Ga. 1993); *S.J.T., Inc. v. Richmond County*, 430 S.E.2d 726 (Ga. 1993), *cert. denied*, 510 U.S. 1011 (1993).

Additionally, the exception for private clothing-optional facilities accords with *Roberts v. Clement*, 252 F. Supp. 835 (E.D. Tenn. 1966), which found a state statute criminalizing "operating a nudist colony" void for vagueness. The language of Chapter 542 avoids the vagueness problem inherent in the statute at issue in *Roberts* through use of the phrase "a private facility which has been formed as a family-oriented clothing-optional facility, properly licensed by the state." Furthermore, it accords with Judge Barr's concurring opinion in *Roberts*, which argued that criminalizing such facilities violates substantive due process.[8] *Id.* at 848 (Barr, J. , concurring) . Thus, the exceptions listed are necessary to accord with the constitutional limits placed on our freedom of expression.

Finally, Plaintiffs' assertion that Chapter 542, on its face, is a content-based regulation of nude barroom dancing is further flawed by the fact that nude barroom dancing is not the only activity prohibited by Chapter 542.

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[8] "The nature of substantive due process is, however, another problem entirely. In this regard I have strong misgivings concerning the Tennessee Nudism Statute and question whether, regardless of the propriety of its grammatical construction, it does not unjustifiably deny liberty by improper encroachment upon the right of privacy and freedom of association."

252 F. Supp. at 846 (Barr, J., concurring).

Clearly, a plethora of unexcepted activities, limited only by the reader's imagination, are also prohibited.

Plaintiffs further argue that legislative intent reveals that Chapter 542 is a content-based statute. *See Church of Lukumi Babalu Ave, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that a court must look to the historical background of a statute in order to determine its content-neutrality). As evidence of this, Plaintiffs quote various legislators' comments, made in committee and on the floor during legislative debate, which assert that Chapter 542 is designed to apply to the adult entertainment industry. Indeed, this issue was discussed extensively in these arenas. Taken in context, however, the comments show no impermissible targeting of protected speech or conduct; on the contrary, when read in tandem with the full record of legislative history, the comments constitute overwhelming evidence that this bill was enacted as a content-neutral regulation.

The legislative history of Chapter 542 in its entirety reveals that Tennessee's state legislature also intended to address felonious activity including money laundering, tax evasion, drug trafficking, prostitution, and rape; public health concerns including the spread of sexually transmitted diseases; and public welfare concerns including family dissolution, child neglect, the degradation of women, and the spread of urban blight. S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994. Undoubtedly, many of the legislators supported Chapter 542 because they were concerned about the impact of nude dancing on the state of Tennessee. Other legislators, however, apparently were concerned with other effects of public

nudity in general. As the Supreme Court noted in *O'Brien:*

> It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator had made a "wiser" speech about it.

391 U.S. at 384, *quoted in Barnes,* 501 U.S. at 583 (Souter, J., concurring). Similarly, in finding a county ordinance regulating public nudity constitutional, the United States District Court for the Middle District of Florida stated:

> Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. It does not matter, therefore, as Plaintiff alleges, that Ordinance 92-12 was specifically aimed by its proponents at Plaintiff's business. It is, on its face, a law of general application to all nudity in public places and the fact – if it is a fact – that the Plaintiff's activities prompted its passage is of no constitutional significance.

Cafe 207, Inc. v. St. John's County, 856 F. Supp. 641, 644 n.3 (M.D. Fla. 1994). Accordingly, the Court finds that Chapter 542 is a content-neutral regulation of public nudity, and therefore is subject to the *O'Brien* test used by the Supreme Court in *Barnes*.

As the Court has found Chapter 542 to be content-neutral, the Court's analysis of this case is controlled by the Supreme Court's decision in *Barnes*. Because *Barnes* produced no single majority opinion, this Court must view the *Barnes* holding as " 'that position taken by those Members who concurred in the judgments on the narrowest grounds. . . . ' " *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)). The United States Court of Appeals for the Sixth Circuit held in *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), that Justice Souter's concurrence in *Barnes* provided the narrowest grounds for analyzing the ordinance at issue. *Id.* at 132. *See also SBC Enterprises, Inc. v. City of South Burlington*, 892 F. Supp. 578, 582 (D. Vt. 1995) (agreeing that Justice Souter's concurrence provided the narrowest grounds for analyzing the public indecency statute).

Under Justice Souter's approach, the Court finds that Chapter 542 is valid. Justice Souter, like the plurality, analyzed the Indiana public indecency statute under the *O'Brien* test. The *O'Brien* test, articulated above, provides that a statute will be upheld as constitutional:

> (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the

> governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 376-77. As both the plurality opinion and Justice Souter's concurrence in *Barnes* state, regulating public indecency is clearly "within the constitutional power of the State." *Barnes*, 501 U.S. at 567 (plurality opinion), 583 (Souter, J., concurring). They further agree that the regulation of public nudity easily meets the second prong of the *O'Brien* test, i.e., it furthers an important or substantial governmental interest. *Id.* Justice Souter considered the need to combat the secondary effects of nudity in adult-oriented businesses to be an important or substantial governmental interest. *Id.* at 583-84 (Souter, J., concurring). Likewise, the legislative history of Chapter 542, discussed above, reveals that the Tennessee legislature enacted the statute to address the important or substantial governmental interest of combatting the secondary effects of public nudity, especially in the adult entertainment context.

The third prong of the *O'Brien* test requires the Court to find that the governmental interest in combatting these secondary effects is unrelated to free expression. Justice Souter stated that the governmental interest of combatting secondary effects of nudity in adult-oriented establishments "is unrelated to the suppression of free expression." *Id.* at 586 (Souter, J., concurring). *See also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (finding that a zoning ordinance regulating adult bookstores did not violate the First Amendment because it

was designed to combat the secondary effects of the location of such businesses rather than regulating the content of the entertainment provided at such establishments). Relying on the language of the preamble, the text, and the legislative history of Chapter 542, Plaintiffs assert that Chapter was designed to suppress the free expression of eroticism. For the reasons discussed above regarding the Court's finding that Chapter 542 is content-neutral, the Court disagrees.

Finally, the fourth prong of the *O'Brien* test requires that the government use the least restrictive means to further its interest. In applying this fourth prong, Justice Souter stated:

> Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.

Barnes, 501 U.S. at 587 (Souter, J., concurring). Chapter 542 requires no more tailoring than the Indiana public indecency statute at issue in *Barnes*. Consequently, the Court finds that the incidental restriction on Plaintiffs' First Amendment rights by requiring the citizens of Tennessee who wish to express themselves freely by dancing in the nude to don pasties and a G-string is no greater than necessary to further the important governmental interest of combatting the secondary effects of public nudity.

As the Court has found that Chapter 542 meets all four prongs of the *O'Brien* test, it comports with the

analysis of Justice Souter's opinion in *Barnes*. Accordingly, the Court finds that Chapter 542 does not violate Plaintiffs' right to free expression guaranteed under the First Amendment to the United States Constitution.

VIII. TENNESSEE CONSTITUTION

In addition to their claim under the First Amendment, Plaintiffs have challenged Chapter 542 as violative of Article I, Section 19 of the Tennessee Constitution, which states in part:

> The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

Tenn. Const. art. I, § 19. Tennessee courts' interpretation of Article 1, Section 19 of the Tennessee Constitution is not bound by the interpretation given to the First Amendment to the United States Constitution. *State v. Marshall*, 859 S.W.2d 289, 294 (Tenn. 1993). There is no indication, however, that the Tennessee Constitution provides more protection for nude dancing as expressive conduct than the United States Constitution provides. Indeed, the Tennessee Supreme Court has adopted the *O'Brien* test in analyzing the regulation of conduct that has both speech and non-speech elements. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444 (Tenn. 1979) (applying the *O'Brien* test to an ordinance governing the delivery and distribution of printed material challenged under the First Amendment to the United States Constitution and

Article I, Section 19 of the Tennessee Constitution). Therefore, the Court finds that the Tennessee Supreme Court would apply the *O'Brien* test as this Court has to an analysis of Chapter 542 under the Tennessee Constitution. Accordingly, the Court finds that Chapter 542 is not violative of Article I, Section 19 of the Tennessee Constitution.

IX. EQUAL PROTECTION CLAUSE

Plaintiffs next assert that Chapter 542 violates their rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides as follows:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, § 1. Plaintiffs argue that Chapter 542 impermissibly discriminates between those who wish to express themselves freely by dancing in the nude at adult-oriented establishments and those who wish to do otherwise. "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' " *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). In determining whether persons are "similarly circumstanced," "[a] legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns, both public and private, and that account for limitations on the practical ability of the state to remedy every ill." *Plyler*, 457 U.S. at 216. A statute which makes these classifications will not violate the Equal Protection

Clause of the Fourteenth Amendment as long as it does not impermissibly impinge upon a fundamental right or use a suspect classification and it bears a rational relation to a legitimate governmental purpose. *Bery v. City of New York*, 906 F. Supp. 163, 170 (S.D.N.Y. 1995) (holding that a licensing ordinance applied to all vendors except vendors selling newspapers and similar written matter "does not impermissibly impinge upon plaintiffs' First Amendment rights," and therefore, under the rational basis test, does not violate the Equal Protection Clause of the Fourteenth Amendment) (citing *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983); *Story v. Green*, 978 F.2d 60, 63-64 (2nd Cir. 1992)).[9]

As noted above, and as the *Barnes* court found with regard to the Indiana public indecency statute, Chapter

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[9] Plaintiffs rely on the holding of the Second Circuit in *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2nd Cir. 1975), in which the court applied the strict scrutiny analysis to hold that an ordinance distinguishing between topless dancing in a bar and topless dancing in the "legitimate theater" violated equal protection. As the United States District Court for the Middle District of Florida noted in *Cafe 207, Inc. v. St. John's County*, 856 F. Supp. 641 (M.D. Fla. 1994):

> The [*Salem Inn*] opinion proceeded upon the assumption, however, that nudity in both places enjoyed the same level of First Amendment protection and is now undermined by the Supreme Court's decision in *Barnes*. Moreover, it is difficult to see how an effort to draft distinctions between protected and unprotected forms of speech or expressive conduct required by the First Amendment could, without more, be violative of the equal protection clause of the Fourteenth Amendment.

Id. at 650-51.

542 is a content-neutral statute which does not impermissibly impinge upon Plaintiffs' First Amendment rights. Accordingly, the Court will apply the rational basis test to determine its constitutionality. As the Court's earlier discussion of the legislative history of Chapter 542 makes clear, in enacting this statute, the Tennessee legislature was pursuing the legitimate governmental purpose of controlling the secondary effects associated with public nudity, especially as affiliated with the adult entertainment industry. Clearly, the distinctions drawn in the statute are rationally related toward achieving that legitimate governmental goal. The exceptions noted in the statute encompass only "necessary nudity" as that term is understood,[10] performances of serious artistic merit as legally defined,[11] and family-oriented clothing-optional facilities which previous courts have held enjoy constitutional protection.[12] There is no evidence that the activity protected

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[10] For a list of hypothetical situations that may be described as necessary nudity, see *United States v. Biocic*, 928 F.2d 112, 117 (4th Cir. 1991) (Murnaghan, J., concurring).

[11] The United States Supreme Court has distinguished between artistic works without serious value and those with "serious artistic, political or scientific value." *Miller v. California*, 413 U.S. 15 (1973). The Court recently confirmed the viability of this standard in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374 (1996). For cases which exemplify this distinction with regard to public nudity in "legitimate theater" and public nudity in adult-oriented businesses, *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), *S.J.T., Inc. v. Richmond County*, 430 S.E.2d 726 (Ga. 1993), *cert. denied*, 510 U.S. 1011 (1993).

[12] *Roberts v. Clement*, 252 F.Supp. 835 (E.D. Tenn. 1966). In his concurrence in *Roberts*, Judge Darr asserts that nudist

by these exceptions produces the secondary effects sought to be avoided by the Tennessee legislature in adopting Chapter 542. Consequently, the Court finds that the inclusion of these exceptions bears a rational relationship to the asserted governmental interest in enacting Chapter 542, and therefore, Chapter 542 does not violate the Equal Protection Clause of the Fourteenth Amendment.

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colonies enjoy constitutional protection under the First and Fourteenth Amendments, noting:

> The matter here for decision is not whether the state can prohibit public nudity, but whether it can prohibit the private, secluded, unobtrusive practice of nudism, without a clear showing that such nudism improperly encroaches upon some other legally protected right.
>
> In order to constitutionally prohibit group association for private action there must be established a strong present public need for such prohibition. *Griswold v. State of Connecticut*, [381 U.S. 479 (1965)]. In other words, to invalidate the Tennessee Nudist statute there must appear a cause 'which is sufficient to justify the deterrent effect . . . (upon) the free exercise by the petitioner's members of their constitutional rights of association.' (citations omitted).

Roberts, 252 F. Supp. at 850 (Darr, J., concurring). He then concludes that "the freedom of association and the right of privacy are each constitutional rights, which, for the purposes of this investigation, are absorbed by the Fourteenth Amendment. *Id.*

X. DUE PROCESS CLAUSE

A. EMPLOYER LIABILITY – SUBSTANTIVE DUE PROCESS

Next, Plaintiffs argue that the employer liability section of Chapter 542 violates the Due Process Clause of the Fourteenth Amendment as it does not clearly indicate all of the elements necessary to hold an employer or principal liable for the conduct of his or her employees or contractors. The statute, as codified, provides as follows: "The employer may not be held liable under this section unless it is shown the employer knew or should have known the acts of their employee or contractor were in violation of this statute." Tenn. Code Ann. § 39-13-511(a)(4)(B). Plaintiffs note, however, that Chapter 542, *as passed*, reads as follows: "The employer may not be held liable under this section unless it is shown that the employer knew or should have known *of* the acts of their employee or contractor *is* in violation of this statute." S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994 (emphasis added). The codified version of the statute reflects changes made by the Code Commission pursuant to Section 1-1-108 of Tennessee Code Annotated in an attempt to repair the grammatical errors contained in the original version of Chapter 542.

Plaintiffs first complain that the Code Commission altered the meaning of the statute by deleting the word "of" and changing the word "is" to "were." They argue that the Code Commission should have left the "of" and deleted the "is." In determining the constitutionality of this provision, however, it is unnecessary to consider the correctness of the changes made by the Code Commission

because the Court must look to the statute as passed rather than as codified in addressing Plaintiffs' attacks on the statute's constitutionality. *United States v. Welden*, 377 U.S. 95, 98 n. 4 (1964); *Marx v. Centran Corp.*, 747 F.2d 1536, 1548 n. 10 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *Lode v. Leonardo*, 557 F. Supp. 675, 677 (N.D. Ill. 1982).

Plaintiffs next assert that the employer liability provision of Chapter 542 violates substantive due process protection in that it does not require that the employer direct or authorize the conduct of the employee nor that the conduct be performed in the scope of employment in order to hold the employer criminally liable. In support of this argument, the Memphis Plaintiffs rely on Volume 22 of CORPUS JURIS SECUNDUM Criminal Law § 131. While that text does note that many states have traditionally required that an employee's conduct be performed in the course of his or her performance and at the direction of his or her employer in order to hold the employer vicariously liable for that conduct, it does not state that the Due Process Clause requires that these criteria be met. In fact, in *United States v. Park*, 421 U.S. 658 (1975), the United States Supreme Court held that an employer may be held vicariously liable by virtue of his relationship to the actor regardless of whether or not he was aware of the actor's wrongdoing. *Id.* at 672-73. The Court grounded the employers' criminal liability in their failure to exercise the authority reposed in them by their supervisory position. *Id.* at 671. *See also United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943); *United States v. Balint*, 258 U.S. 250 (1922).

Furthermore, the Court agrees with Plaintiffs that in order to hold an employer vicariously liable for the conduct of his or her employee that conduct must be performed in the scope of employment. However, it is unnecessary that the statute itself include the phrase "in the scope of employment." Chapter 542 provides: "If a person is arrested for public indecency *while working* as an employee or a contractor, the employer or principal may be held liable for a fine imposed by this subsection." Tenn. Code Ann. § 39-13-511(a)(4)(A) (emphasis added). The Court finds that this language is sufficient to limit the liability of the employer or principal to only those actions of their employees or contractors performed in the scope of employment. This interpretation is consistent not only with the plain language of the statute but also with Tennessee common law which holds that a master will he held liable for the acts of his or her servant only if the servant performs those acts while doing the work of the master. *Hoover Motor Express Co. v. Thomas*, 65 S.W.2d 621, 636 (Tenn. Ct. App. 1933) (citing cases).

Plaintiffs' final complaint regarding the employer liability provision is that, as enacted, it is unconstitutionally vague. Subsection (B) of the employer liability section provides that an employer will be held liable for the conduct of his or her employee if "he knew or should have known of the acts of their employee or contractor is in violation of the statute." While this sentence is clearly grammatically incorrect, the Court finds that it can only reasonably be interpreted to require that an employer know or should know of the conduct of his or her employee in order to be held liable. Thus, the sentence gives fair warning to employers and principals and meets

the standards of fundamental fairness that due process requires. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 746 (Tenn. 1979). Accordingly, the Court finds that the employer liability provision of Chapter 542 comports with the requirements of due process.

B. VAGUENESS AND OVERBREADTH

Plaintiffs have also argued that many of the exceptions and definitions in Chapter 542 are unconstitutionally vague and the statute itself is overbroad. Specifically, Plaintiffs have challenged the exceptions and/or definitions of legitimate theatrical performances, modeling classes, family-oriented clothing-optional facilities, public places, and other exceptions and definitions in Chapter 542.

The classic formulation of the test for unconstitutional vagueness is that of Justice Sutherland in *Connally v. Gen. Const. Co.*, 269 U.S. 385 (1926):

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Id. at 391. Regarding the theatrical performance exception, the United States Supreme Court established guidelines under which such productions are to be judged in *Miller v. California*, 413 U.S. 15 (1973), and confirmed the viability of this standard in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, ___ U.S. ___, 116 S. Ct. 2374 (1996).[13] *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *S.J.T., Inc. v. Richmond County*, 430 S.E.2d 726 (Ga. 1993). Accordingly, the Court finds that there should be no confusion in the minds of the

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[13] In *Denver Area*, the Supreme Court noted that the language of the statute at issue as similar to the language of the California statute adopted by the Court in *Miller v. California*, 413 U.S. 15, 24 (1973), as a "guideline" for identifying materials that states may proscribe as constitutionally obscene. The *Denver Area* Court remarked:

> In *Miller*, the Court defined obscene sexual material (material that lacks First Amendment protection) in terms of
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> > "(a) whether the average person, applying contemporary standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."
>
> The language, while vague, attempts to identify the category of materials that Justice Stewart thought [sic] could be described only in terms of "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring).

116 S. Ct. 2389-90 (citations omitted) (emphasis deleted).

public or those charged with enforcing the laws in determining what constitutes legitimate theatrical performances.

Plaintiffs also argue that the modeling class exception is vague, pointing out that the statute refers to "modeling classes" rather than a model in an art or drawing class. While the Court agrees that the exception is inartfully worded, the exception refers to such classes operated by defined educational institutions. When the legislative history of Chapter 542 is read in context, the intent of this exception is clear especially when viewed in light of similar public indecency statutes from other states. *See State v. Nelson*, 178 N.W.2d 434, 438 (Iowa 1970) (upholding criminal convictions under a public nudity statute with exceptions for artists' models, patients before doctors and nurses, accidental nudity, etc.), *cert. denied*, 401 U.S. 923 (1971). Thus, the Court finds that the reader should have no confusion regarding who may be excepted from the purview of Chapter 542 under the modeling class exception.

Additionally, Plaintiffs have asserted that the exception provided for family-oriented clothing-optional facilities is unconstitutionally vague. The Court acknowledges the awkwardness of the long phrase which the Tennessee legislature chose for denominating these facilities; it is excused, however, by the fact that such awkwardness is justified by the court's decision in *Roberts v. Clement*, 252 F. Supp. 835 (E.D. Tenn. 1966). There, the court addressed the constitutionality of a statute banning "nudist colonies." The court held that the statute was too vague and indefinite to comply with the due process of law provision of the Fourteenth Amendment to the United States

Constitution and struck it for "lack of appropriate definiteness." *Id.* at 845. As a result, a phrase such as the one used in Chapter 542 is properly descriptive to avoid a vagueness challenge. The Court finds that the phrase used in Chapter 542 is sufficient to fairly apprise the public, law enforcement officials, and members of the judiciary of the legislature's intent.[14]

Plaintiffs next argue that the statute requires that the family-oriented clothing-optional facility be properly licensed by the state in order to be excluded from the Chapter 542's purview. Plaintiffs note, however, that Tennessee has no such licensing requirement for family-oriented clothing-optional facilities, nudist colonies, or other similar facilities. While the Court is also unaware of state regulation of such facilities, inclusion of this requirement does not render the statute void for vagueness or ambiguity. Clearly, the legislature intended to allow existing private family-oriented clothing-optional facilities to continue to operate. Because no licensing requirement is established by the state, one cannot say that such facilities are not properly licensed, and thus in violation of

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[14] Those needing guidance in interpreting the phrase "family-oriented clothing-optional facility" may find Judge Darr's concurrence in *Roberts* instructive:

> [I]n this day people fully understand what a nudist colony is and what a nudist practitioner is. A nudist colony, I think, is generally understood to be a group of people of both sexes who seclude themselves from the public eye and live together without any clothes and that any person who engages in nudist practices is a member of such nudist colony.

252 F. Supp. at 846.

Chapter 542. Furthermore, the inclusion of the requirement that the facility be properly licensed by the state may also be considered proscriptive, such that if Tennessee were to establish such a licensing requirement, these facilities would be on notice that compliance with the licensing requirement is necessary to fall within Chapter 542's exception.

Plaintiffs have also challenged the vagueness of the definition of "public place" found in Chapter 542. For example, Plaintiffs question whether duplexes and apartment buildings would he included within the statutory definition of "public place." The Court finds, however, that Chapter 542 contains a reasonable and adequate definition of a public place, which specifically excludes, among other locations, "premises used solely as a private residence, whether permanent or temporary." In addition, a number of courts have long upheld similar statutes with even less exacting definitions of "public place." In *Hearn v. District of Columbia,* 178 A.2d 434 (D.C. 1962), for example, the Municipal Court of Appeals for the District of Columbia reversed a criminal defendant's conviction for indecent exposure where the defendant had repeatedly stood naked in a hotel window, finding that the defendant's hotel room was not a public place despite the fact that the ordinance did not include an exception for private places, much less an exemption for hotel rooms.[15]

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[15] The court held:

> An exposure becomes indecent when it occurs at such a time and place where a reasonable man knows or should know his act will be open to the cbservation of others. The required criminal intent is usually

Similarly, in *State v. Peery*, 28 N.W.2d 851 (Minn. 1947), the Supreme Court of Minnesota reversed a defendant's conviction for indecent exposure because he was not in a public place. The court held that the defendant's action of walking nude in front of the window in his dormitory room, which was open to view to the adjacent sidewalk, did not constitute a exposure of one's person in a public place. *Id.* at 855.

Chapter 542 exceeds the language of many other public indecency statutes that give no definition of "public place," leaving courts to define it through common law, which has been done. In *Long v. State*, 666 N.E.2d 1258 (Ind. Ct. App. 1996), the Indiana Court of Appeals defined "public place" to be "any place where members of the public are free to go without restraint." *Id.* at 1260.[16] Additionally, the Court in *Borough of Belmar v.*

> established by some action by which a defendant draws attention to his exposed condition or by a display in a place so public that it must be presumed it was intended to be seen by others. However, the defendant must be aware of all those facts which make his conduct criminal. Nudity is not per se 'obscene.' It is not illegal for a man to be completely unclothed in his room. It becomes so only if he intentionally exposes himself to other persons.

Hearn, 178 A.2d at 437 (footnotes omitted). *See also Miller v. Barberton Municipal Court*, 935 F.2d 775 (6th Cir. 1991) (holding that a public indecency statute prohibiting nudity in a place where one is likely to be viewed by others who are not members of his or her household applied to a defendant who swam nude in a local nude swimming club that was hidden by a fence but still somewhat visible to the surrounding neighbors).

[16] The court did note, however, that private areas may exist within a public place, thereby precluding prosecution for public

Buckley, 453 A.2d 910 (N.J. Super. Ct. App. Div. 1982), upheld a conviction under an indecent exposure statute which made it unlawful to appear nude "in any public place," without defining that term. The court found that the ordinance "met constitutional muster since it gave a person of ordinary intelligence fair notice of the nature of the prohibited conduct." *Id.* at 913 (citations omitted). Furthermore, the definition of public place in Chapter 542 notes that the examples of public places given in the definition are intended only to be instructive and not exhaustive. One cannot reasonably expect that every conceivable public place be specifically listed. Thus, the definition leaves room for interpretation, as it must.

Although Plaintiffs have asserted that many other exceptions and definitions in Chapter 542 are unconstitutionally vague and the statute itself is overbroad, and in so doing have proposed a number of hypothetical situations that may or may not fit within these exceptions and definitions, the Court finds that they are sufficiently clear when read in context and readily understood in light of the secondary effects sought to be addressed by the Tennessee legislature.[17] it would be unreasonable, as well as

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indecency. *Long*, 666 N.E.2d at 1261 (citing *Lasko v. State*, 409 N.E.2d 1124 (Ind. Ct. App. 1980) (finding that a locked separate room within a massage parlor was not a public place); *Sweeney v. State*, 486 N.E.2d 651 (Ind. Ct. App. 1985) (finding an enclosed viewing booth was not a public place); *Adims v. State*, 461 N.E.2d 740 (Ind. Ct. App. 1984) (finding a stage with more than one dancer surrounded by six enclosed viewing booths permitting more than one viewer to be a public place)).

[17] Since the Nineteenth Century, American courts have upheld statutes with similar language prohibiting public nudity

undesirable, to draft a statute that attempted to include every conceivable exception necessary to define a public

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despite the fact that this language may leave room for interpretation with respect to accidental and necessary public nudity. *See, e.g., Chubb v. State,* 640 N.E.2d 44 (Ind. 1994) (holding that while a bathroom stall may be considered a private place, once defendant reached over the partition to the adjoining stall to fondle a police officer's genitals it was transformed into a public place); *State v. Baysinger,* 397 N.E.2d 580 (Ind. 1979) (acknowledging the common law history of interpretation given to the definition of "public place") (citing *McJunkins v. State,* 10 Ind. 140 (1858)). In making these determinations regarding the numerous situations in which a violation of a public indecency statute could be found, courts necessarily inject a dose of common sense in their decisions. As Judge Murnaghan noted in his concurrence in *Biocic*:

> Though logic has impelled the prosecution to insist that the law admits of no exceptions, it is literally beyond comprehension to conceive that a mother of a two-year old infant, even on a heavily populated beach would be hauled into federal court for changing a diaper in response to a call of nature. The same thing I daresay would be true in the case of a three-year old openly relieving himself or herself, or a four-year old cavorting stark naked at the water's edge. And what of a woman wearing a one-piece bathing suit who lowers her suit to remove an offending piece of slime from her stomach area? Or a man who, upon viewing no one in the vicinity, finds the lure of the water undeniable, and begins to change into bathing trunks? In its zeal, the prosecution, with a straight face, classifies such hypothetical occurrences as crimes. Criminal "indecency," the language involved, involves concepts of offensiveness and public outrage at the behavior. Only those aspects of public nudity prohibited by the statute which are also "indecent" or "offensive" can be made illegal by the federal

place. It would pose a drafting nightmare which would require continual revision in order to respond to societal changes. The American legal system depends on the common law to adapt our laws to these changes, as well as the judiciary's ability to give sensible construction to the statutes as written.[18] Simply sitting back and imagining

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regulation. I submit that the above examples could not be so found.

928 F.2d at 117 (Murnaghan, J., concurring).

See also SBC Enterprises, Inc. v. City of South Burlington, 892 F. Supp. 578 (D. Vt. 1995) (upholding constitutionality of statute defining nudity to include covered male genitalia in a discernibly turgid state); *Long v. State*, 666 N.E.2d 1258 (Ind. Ct. App. 1996) (same).

[18] In *Belmar*, the court stated:

> The meaning of portions of the ordinance may be debatable. Nevertheless, we have no doubt that the proscription against "indecent or unnecessary exposure" of the person would unmistakably apprise persons of ordinary intelligence that topless sunbathing on a public beach in the summertime by a female adult lying on her back is prohibited. We recognize that that might not be so in other societies having different mores and customs, but the import and applicability of the prohibition to the conduct here in this societal context is beyond reasonable debate.

453 A.2d at 912.

Similarly, in his concurring opinion in *Biocic*, Judge Murnaghan noted:

> An increasingly large number of persons comprising the body politic does not agree with the definition of indecency. While I have substantial doubts as to how long the almost-everyone-feels-that-way attitude will prevail, bearing in mind how

situations, no matter how illogical or impractical, in which Chapter 542 would be unconstitutional if applied to those facts is not sufficient to succeed on a claim of overbreadth. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). The Supreme Court has held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *SBC Enterprises, Inc. v. City of South Burlington*, 892 F. Supp. 578 (D. Vt. 1995). Thus, the Court finds that the exceptions and definitions listed in Chapter 542 are not unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

> rapidly the country passed through the era in the 1890s when men first began to swim bare breasted or the demise of the necessity for women to wear stockings and shoes while swimming, I acknowledge that, as of the moment, the predominant belief as to what constitutes propriety and indecency relied on by the majority still endures.

928 F.2d at 116 (Murnaghan, J., concurring).

> The time may well soon come, as it has already with the French and others, when the perceived public sense of outrage will wane. Biocic's action will then be classified as non-criminal, not because it was a bold blow for "liberty," but because it was too trifling – perhaps even childish – a matter for a community to spend time and energy addressing.

Id. at 117.

For the reasons discussed above, the Court finds that Chapter 542 is not violative of the First Amendment, the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 19 of the Tennessee Constitution. The Court, therefore, declares Chapter 542 to be constitutional. Accordingly, Defendants' Motions to Dismiss and/or for Summary Judgment are hereby granted and Plaintiffs' Motions to Dismiss and/or for Summary Judgment are hereby denied.

XI. CHATTANOOGA CITY ORDINANCES

Finally, the Chattanooga Plaintiffs have challenged the constitutionality of a number of Chattanooga city ordinances regulating activity in adult-oriented businesses. The ordinances of which the Chattanooga Plaintiffs complain read as follows:

> Section 25-84. Indecent exposure.
>
> It shall be unlawful for any person in the city in a public place to engage in the willful and intentional exposure of such person's genitals and buttocks to one (1) or more other persons where the exposing person may reasonably expect his conduct to be viewed by another for the purpose of sexual arousal, gratification or offending the viewing person.
>
> Section 25-85. Lewd and indecent conduct.
>
> (a) Definitions. As used in this section, the following terms shall have the meanings indicated:
>
> *Public place* shall include: streets, sidewalks or highways; transportation facilities;

schools; places of amusement; parks, playgrounds; restaurants; nightclubs; cocktail lounges; burlesque houses; bars; cabarets; taverns; taprooms; private fraternal, social, golf or country clubs; or any place that allows the consumption of intoxicating beverages on the premises.

Wholly or substantially exposed to public view, as it pertains to breasts, shall mean the showing of the female breast, in a public place, with less than a fully opaque covering of any portion of the breast below the top of the nipple.

(b) *Prohibited acts.* it shall be unlawful for any person to perform in a public place, or for any person who owns or operates premises constituting a public place to knowingly permit or allow to be performed therein, any of the following acts or conduct:

(1) The performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(2) The actual or simulated touching, caressing or fondling of the breasts, buttocks, anus or genitals in public; or

(3) The actual or simulated public displaying of the pubic hair, anus, vulva or genitals;

(4) The appearance by any female in a public place so costumed or dressed that one or both breasts are wholly or substantially exposed to public view, or any owner

or operator of premises constituting a public place knowingly permitting or allowing any such person to appear on the premises owned or operated by him.

(c) Penalty. Any person violating any of the provisions of this section, upon conviction by the court, may be imprisoned for not more than thirty (30) days, and shall be fined no less than twenty-five dollars ($25.00), nor more than fifty dollars ($50.00) for each violation.

Section 11-434. Responsibilities of the Operator.

(j) A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

This Adult-Oriented Establishment is Regulated by Chattanooga City Code, Part II [Chapter 11], Article XV, Sections[s] 11-421 through 11-437. Entertainers Are:

1. Not permitted to engage in any type of sexual conduct;

2. Not permitted to expose their sex organs;

3. Not permitted to demand or collect all or any portion of a fee for entertainment before its completion.

Section 11-435. Prohibitions and unlawful sexual acts.

(c) No operator, entertainer, employee, or customer shall be unclothed or in such attire, costume, or clothing so as to expose to view any portion of the sex organs, breasts or buttocks of said operator, entertainer, or employee with the intent to arouse or gratify the sexual desires of the operator, entertainer, employee, or customer.

The Chattanooga Plaintiffs brought this suit pursuant to 42 U.S.C. 1983, alleging that the above ordinances are facially unconstitutional and as applied to them. Specifically, the Chattanooga Plaintiffs have argued that the ordinances are violative of their First, Fifth, and Fourteenth Amendment rights under the United States Constitution and Article 1, Sections 8 and 19 of the Tennessee Constitution due to their overbreadth and their content-based restrictions.

Most of the Chattanooga Plaintiffs' arguments as they pertain to the city ordinances are the same as those discussed in the previous sections regarding Chapter 542. For the reasons stated above, the Court finds that the Chattanooga city ordinances are likewise constitutional. The city ordinances are content-neutral both on their faces and as applied; therefore, they are not violative of the Chattanooga Plaintiffs' First Amendment right to freedom of expression or Article I, Section 19 of the Tennessee Constitution. Likewise, the Court finds that the Chattanooga city ordinances are not violative of the Equal Protection Clause of the Fourteenth Amendment.

With regard to the Chattanooga Plaintiffs' argument concerning the ordinances' overbreadth, the Court finds instructive the opinion of the Honorable R. Allan Edgar of the United States District Court for the Eastern District of Tennessee. Judge Edgar noted that there was no relevant distinction between Chattanooga City Ordinance Section 25-85 ("Section 25-85") and the statute at issue in *Barnes. DLS, Inc. v. City of Chattanooga*, 914 F. Supp. 193, 196-97 (E.D. Tenn. 1995). He thus concluded, as the *Barnes* Court did, that Section 25-85 is constitutional. *Id.* The

Court agrees with Judge Edgar's assessment and reaches the same result.

Chattanooga Plaintiffs further argue that Section 25-85 is analogous to the statute at issue in *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), which the Sixth Circuit struck down as unconstitutional. In *Triplett Grille*, the court noted the statute could apply to legitimate theater as well as to adult-oriented businesses. Because nudity in legitimate theater enjoys greater constitutional protection than nudity in adult-oriented businesses, the statute, which facially applied to both, was struck down as overbroad. *Id.* at 136. As Judge Edgar pointed out, however, Section 25-85 is unlike the statute at issue in *Triplett Grille* because Section 25-85 had not been construed to include theaters and auditoriums in the definition of "public place."[19] *DLS*, 914 F. Supp. at 196. Furthermore, the Sixth Circuit's decision in *Triplett Grille* is distinguishable from the present case because, like the statute at issue in *Barnes*, to which the Indiana Supreme Court had given a limiting construction, Section 25-85 has been given a limiting construction by the Tennessee

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[19] "[A]t one time the ordinance did include within the definition of a "public place" the terms "theaters" and "auditoriums." After an adverse decision by the Tennessee Court of Appeals in 1978, the City removed this terminology from the ordinance. Therefore, despite the Sixth Circuit's *Triplett* decision, it is clear that § 25-85 is not overbroad."

DLS, Inc. v. City of Chattanooga, 914 F. Supp. 193, 196 (E.D. Tenn. 1995).

Supreme Court.[20] *See Triplett Grille*, 40 F.3d at 136 n.3 (distinguishing the statute at issue in *Barnes* from the Akron statute at issue in *Triplett Grille*). Accordingly, in agreement with Judge Edgar and the Supreme Court's decision in *Barnes*, the Court finds that Section 25-85 is not unconstitutionally overbroad. Therefore, the Court finds the Chattanooga city ordinances to be constitutional.

XII. CONCLUSION

For the foregoing reasons, the Court finds that neither Chapter 542 nor the Chattanooga city ordinances are violative of the First or Fourteenth Amendments to the United States Constitution or Article I, Section 19 of the Tennessee Constitution. As the Court has found both Chapter 542 and the Chattanooga city ordinances to be constitutional under both the United States Constitution and the Tennessee Constitution, all outstanding motions regarding efforts to amend complaints and other ancillary issues are hereby rendered moot. Accordingly, for the reasons stated above, the Court finds as follows:

(1) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case

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[20] In *City of Chattanooga v. McCoy*, 645 S.W.2d 400 (Tenn. 1983), the Tennessee Supreme Court held:

> The obvious thrust of the Chattanooga ordinance is to outlaw nudity and indecent sexual conduct in public without any express or implied intent to suppress or prohibit any legitimate speech or expression entitled to First Amendment protection.

Id. at 403.

number 3-94-0494, *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*; Docket Entry No. 30) is hereby GRANTED;

(2) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0571, *James Corbett Chick, d/b/a The Brass Stables, C & A Entertainment, Inc., and Dawn Pierce v. The Metropolitan Government of Nashville Davidson County, Tennessee, and Robert E. Kirchner, Jr.*; Docket Entry No. 18) is hereby GRANTED;

(3) Motion by Defendants to Dismiss for Failure to State a Claim or in the Alternative for Summary Judgment (originally filed in case number 3-94-0990, *Steve Cooper, et al. v. City of Memphis, et al.*; Docket Entry No. 0) is hereby GRANTED;

(4) Motion by Defendant City of Memphis for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 26) is hereby GRANTED;

(5) Motion by Defendants Weakley County and Sheriff Michael A. Wilson for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 27) is hereby GRANTED;

(6) Motion by Memphis Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 35) is hereby DENIED;

(7) Motion by Deja Vu Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 40) is hereby DENIED;

(8) Motion by Chick Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 44) is hereby DENIED;

(9) Motion by Jackson Tag-Along Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 45) is hereby DENIED;

(10) Motion by Chattanooga Defendants to Dismiss (originally filed in case number 3-96-0372; Docket Entry No. 21) is hereby GRANTED;

(11) Motion by Deja Vu Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 70) is hereby DENIED as MOOT;

(12) Motion by Chick Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 76) is hereby DENIED as MOOT;

(13) Motion by Deja Vu Plaintiffs for Additional Time to File Responsive Affidavit of Dr. Edward Donnerstein (filed in case number 3-94-MD-1031; Docket Entry No. 79) is hereby DENIED as MOOT;

(14) Motion by Chick Plaintiffs to Amend Complaint (Chick Plaintiffs' "Second Motion to Amend Complaint") (filed in case number 3-94-MD-1031; Docket Entry No. 84) is hereby DENIED as MOOT;

(15) Motion by Deja Vu Plaintiffs to Strike and Notice of Objection as to Certain Matter (filed in case

number 3-94-MD-1031; Docket Entry No. 71) is hereby DENIED as MOOT.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION,	))))	MDL Docket No. 1031 All Cases Judge Echols

ORDER

Pending before the Court are a number of summary judgment motions and/or motions to dismiss filed in the original case, *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, No. 3-94-0494 (M.D. Tenn. filed June 14, 1994), and in other similar cases which have been transferred to this Court under 28 U.S.C. § 1407, which provides for consolidation in multidistrict litigation. For the reasons discussed in the accompanying Memorandum, the Court finds as follows:

(1) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0494, *Deja Vu of Nashville, Inc., et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*; Docket Entry No. 30) is hereby GRANTED;

(2) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0571, *James Corbett Chick, d/b/a The Brass Stables, C & A Entertainment, Inc., and Dawn Pierce v. The*

Metropolitan Government of Nashville Davidson County, Tennessee, and Robert E. Kirchner, Jr.; Docket Entry No. 18) is hereby GRANTED;

(3) Motion by Defendants to Dismiss for Failure to State a Claim or in the Alternative for Summary Judgment (originally filed in case number 3-94-0990, *Steve Cooper, et al. v. City of Memphis, et al.*; Docket Entry No. 0) is hereby GRANTED;

(4) Motion by Defendant City of Memphis for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 26) is hereby GRANTED;

(5) Motion by Defendants Weakley County and Sheriff Michael A. Wilson for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 27) is hereby GRANTED;

(6) Motion by Memphis Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 35) is hereby DENIED;

(7) Motion by Deja Vu Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 40) is hereby DENIED;

(8) Motion by Chick Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 44) is hereby DENIED;

(9) Motion by Jackson Tag-Along Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 45) is hereby DENIED;

(10) Motion by Chattanooga Defendants to Dismiss (originally filed in case number 3-96-0372; Docket Entry No. 21) is hereby GRANTED;

(11) Motion by Deja Vu Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 70) is hereby DENIED as MOOT;

(12) Motion by Chick Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 76) is hereby DENIED as MOOT;

(13) Motion by Deja Vu Plaintiffs for Additional Time to File Responsive Affidavit of Dr. Edward Donnerstein (filed in case number 3-94-MD-1031; Docket Entry No. 79) is hereby DENIED as MOOT;

(14) Motion by Chick Plaintiffs to Amend Complaint (Chick Plaintiffs' "Second Motion to Amend Complaint") (filed in case number 3-94-MD-1031; Docket Entry No. 84) is hereby DENIED as MOOT;

(15) Motion by Deja Vu Plaintiffs to Strike and Notice of Objection as to Certain Matter (filed in case number 3-94-MD-1031; Docket Entry No. 71) is hereby DENIED as MOOT.

Accordingly, this case is hereby DISMISSED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX

"C"

ATTACHMENT 1

NOT RECOMMENDED FOR PUBLICATION

No. 94-5990

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEJA VU OF NASHVILLE, INC., A Tennessee Corporation; JOHN CHRISTOPHER COX; GOOD TIMES, INC., d/b/a Mouse's Ear Lounge a Tennessee Corporation; BOB POPE, d/b/a Bob's Gold Club; DENISE BENSON and DELAINA A. CAISE, individually,	*	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
Plaintiffs-Appellants,	*	
v.	*	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, ROBERT E. KERCHNER, JR., Chief of Police of the Metropolitan Police Department, CHARLES W. BURSON, Attorney General, State of Tennessee,	*	(Filed Jan. 10, 1996)
Defendants-Appellees.	*	

BEFORE: MARTIN, JONES, Circuit Judges, and COHN, District Judge.*

---

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

The Tennessee legislature enacted Chapter 542 of the Public Acts of 1994 to criminalize public nudity and other associated conduct in specifically enumerated circumstances. The statute was set to take effect on July 1, 1994. On June 14, 1994, DeJa Vu of Nashville and other businesses and individuals primarily engaged in the exhibition of live nude and/or semi-nude entertainment ("Plaintiffs") brought a cause of action pursuant to 42 U.S.C. § 1983 to enjoin and to declare as unconstitutional the Tennessee anti-nudity statute. Plaintiffs sued the Metropolitan Government and Police Department of Nashville and the State of Tennessee ("Defendants") in the United States District Court for the Middle District of Tennessee, filing a complaint for Preliminary Injunction, Permanent Injunction, Damages and Declaratory Judgment, a Motion for Issuance of Temporary Restraining Order and Preliminary Injunction, and a brief supporting the motions.

After dismissing the TRO request with Plaintiffs' consent, the district court held a hearing on June 16, 1994. Defendants were given until June 27, 1994, to file briefs in response to Plaintiffs' motion. Meanwhile, this court had heard arguments in the case of *Triplett Grille, Inc. v. City of Akron* on May 2, 1994, which was decided November 14, 1994. *See* 40 F.3d 129 (6th Cir. 1994). Before this Circuit reported its decision in *Triplett Grille,* however, the district court denied Plaintiffs' motion for Preliminary Injunction in an Order and Memorandum entered July 1, 1994. Plaintiffs filed a motion to alter or amend judgment and for additional findings, and on July 28, 1994, filed a notice of appeal regarding the court's denial of injunctive

relief. On August 3, 1994, the district court denied Plaintiffs' motion, and on August 8, 1994, Plaintiffs filed an amended notice of appeal to this court.

Pending the hearing of this appeal, Plaintiffs have not been prosecuted under Chapter 542, and the Metropolitan Police Department of Nashville "has been advised to refrain from enforcing the statute." Tennessee's Br. at 1. Nevertheless, no ripeness or mootness arguments have been made because the statute continues to be enforced in other areas of Tennessee and can at any time be enforced in Nashville. In fact, an *Amicus Curiae* brief has been filed by businesses and individuals operating clubs in Memphis, Tennessee ("Amicus"), which feature dancing that contains nudity as defined in Chapter 542. In their brief, Amicus suggests that the statute has been enforced in Memphis against non-drinking establishments, but not against Amicus.

We are confronted with the issue of whether the district court erred in declining to enter a preliminary injunction to enjoin enforcement of the new Tennessee public indecency statute. In evaluating whether a preliminary injunction should be granted, a court considers:

1. whether the movant is likely to prevail on the merits;

2. whether the movant would suffer an irreparable injury if the court does not grant a preliminary injunction;

3. whether a preliminary injunction would cause substantial harm to others; and

4. whether a preliminary injunction would be in the public interest.

G & V Lounge Inc. v. Michigan Liquor Control Comm'n., 23 F.3d 1071, 1076 (6th Cir. 1994).

Once the district court grants or denies a preliminary injunction, this court reviews that decision for an abuse of discretion. *Id.; Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 (6th Cir. 1991). "[A]n abuse of discretion exists only when the reviewing court is firmly convinced that a mistake has been made. *G & V Lounge*, 23 F.3d at 1076. In the context of a request for a preliminary injunction, the district court abuses its discretion when it "relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Newsom v. Norris*, 888 F.2d 371, 373-74 (6th Cir. 1989).

We find that the district court erred in not granting the preliminary injunction. Upon reviewing the applicable law and facts, we believe that Plaintiffs have presented sufficient information to demonstrate that a preliminary injunction is warranted under the test adopted in *G & V Lounge*. *See*, 23 F.3d at 1076. The district court abused its discretion in denying the preliminary injunction. Accordingly, we REVERSE the district court's judgment, GRANT the Plaintiffs a preliminary injunction, and REMAND the case to the district court for an expedited trial on the merits.

APPENDIX

"D"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INCORPORATED, et al.,	)	
Plaintiff,	)	
v.	)	No. 3:94-0494
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,	)	Judge Echols
Defendants.	)	

MEMORANDUM

Presently pending before the Court is Plaintiffs' Motion for a Preliminary Injunction and Temporary Restraining Order filed on June 14, 1994. A hearing on the motion was held on June 16, 1994, at which time the parties appeared and presented oral arguments with regard to the motion. At the hearing, Defendants were given until June 27, 1994, to file their written response to the motion. Having considered the positions of the parties, the relief requested, and the applicable law, the Motion for Preliminary Injunction is DENIED for the reasons stated herein.

Plaintiffs are various purveyors of nude and/or semi-nude dancing in Tennessee, either as dancers, managers, or owners of clubs where such dancing occurs. They ask this Court to enjoin the enforcement of a recently enacted state statute creating a new offense of public indecency which becomes effective on July 1, 1994,

Chapter 542 of the Public Acts of 1994 ("Chapter 542"). That statute provides as follows:

> SECTION 1. Tennessee Code Annotated, Section 39-13-511, is amended by inserting the following as a new subsection (a) and redesignating the existing subsection (a) as subsection (c):
>
> (a) A person commits an offense:
>
> (1) who, in a public place, as defined in subsection (b)(2), knowingly or intentionally:
>
> (A) engages in sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions or other ultimate sex acts;
>
> (B) appears in a state of nudity; or
>
> (C) fondles the genitals of himself, herself, or another person; or
>
> (2) A person does not violate this subsection if such person makes intentional and reasonable attempts to conceal himself or herself from public view while performing an excretory function and such person performs such function in an unincorporated area of the state.
>
> (b) As used in this act:
>
> (1) "Nudity" or "state of nudity" means the showing of the bare human male or female genitals or pubic area with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of the areola, or the showing of the

covered male genitals in a discernibly turgid state. A mother in the act of nursing her baby shall not be included within this definition.

(2) "Public place" means any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. Public places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not-for-profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal, or similar organizations. Premises used solely as a private residence whether permanent or temporary in nature shall not be deemed to be a public place. Public place shall not include enclosed single sex public restrooms, enclosed single sex functional showers, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctor's [sic] offices, portions of hospitals and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor shall it include a person appearing in a state of nudity in a modeling class operated by: (1) a proprietary school, licensed by the State of Tennessee; a college,

junior college, or university supported entirely or partly by taxation; or (2) a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation or an accredited private college. Public place does not include a private facility which has been formed as a family-oriented clothing optional facility, properly licensed by the state.

(d) Public indecency is punishable as follows:

(1) A first or second offense is a Class B misdemeanor punishable only by a fine of five hundred dollars ($500).

(2) A third or subsequent offense is a Class A misdemeanor punishable by a fine of one thousand five hundred dollars ($1,500) or confinement for not more than eleven (11) months and twenty-nine (29) days or both.

. . .

( )[1] The provisions of this act shall not apply to any theatrical production which contains nudity as defined by this section performed in a theatre by a professional or amateur theatrical or musical company which has serious artistic merit; provided such production is not in violation of Tennessee Code Annotated, Title 39, Chapter 17, Part 9.

. . .

---

[1] In the bill, this subsection is not numbered.

> SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, then all provisions and applications of this act are declared to be invalid and void.

S. 1399 Pub. Chapt. No. 542 of the Pub. Acts of 1994.

Plaintiffs claim that the enforcement of the statute would infringe upon their First Amendment rights of free speech by denying them the right to express erotic messages to the clubs' consenting adult customers by dancing nude. In essence, the Tennessee statute requires male and female dancers in the type of clubs involved in this case to wear an opaque covering over their genitals and female dancers to wear an opaque covering over their areolae. Defendants allege that Tennessee's new public indecency statute was designed to protect morals and public order and to minimize certain adverse effects of public nudity, including nude barroom dancing, and they deny the statute violates the First Amendment.[2] Defendants cite in support of their position the Supreme Court's recent opinion in *Barnes v. Glen Theatres, Inc.*, 111 S.Ct. 2456 (1991), which upheld the enforcement of a similar public indecency statute in Indiana.

A person does not have a constitutional right to go naked or to dance nude in public. However, a plurality of the Supreme Court in *Barnes* held that "non-obscene nude dancing performed for entertainment" is "expressive conduct" entitled to protection under the First Amendment.

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[2] Defendants also seek to invoke the abstention doctrine. Considering the posture of this case, the Court concludes that abstention is not required under these circumstances.

Id. at 511. The Court has suggested the same result in other cases under some circumstances. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972). These holdings do not end the inquiry. Rather, they trigger the beginning of the analysis of the rights sought to be protected and the right of the government to proscribe certain conduct or activities under the facts presented in this case.

For example, if the Plaintiffs' conduct is entitled to constitutional protection, what is the appropriate level of protection to be afforded such expressive conduct. The Supreme Court's pronouncements on this subject are somewhat hazy. The level of protection has been described as "marginal," "the barest minimum of protection," and "within the outer limits of the First Amendment." *See Barnes v. Glen Theatres, Inc.*, 111 S.Ct. 2456 (1991); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972).

At this stage of the proceeding, however, before analyzing the merits of the case, the sole question before the Court is whether Plaintiffs are entitled to a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. An injunction is an extraordinary process. The Court's discretion as to whether relief should be granted is guided by a consideration of the following factors:

> (1) Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;
>
> (2) Whether the plaintiff has shown irreparable injury;

(3) Whether the issuance of a preliminary injunction would cause substantial harm to others;

(4) Whether the public interest would be served by issuing a preliminary injunction.

Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 102-104 (6th Cir. 1982).

The Court finds that the statute is not unconstitutional on its face in light of the Supreme Court's decision in *Barnes* and Plaintiffs have not shown a substantial likelihood that they will succeed on the merits of their case. Although it is not identical, Tennessee's statute is very similar to the Indiana public indecency statute. Indeed, Chapter 542's preamble clearly indicates that Tennessee's legislature intended to model its law after the Indiana statute after it was found to be constitutional. A comparison of the two statutes reveals that the basic prohibitions and the definition of "nudity" are essentially the same.[3]

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[3] The Indiana statute provides that:

(a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct;

(3) appears in a state of nudity; or

(4) fondles the genitals of himself or another person;

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less that a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

However, the Tennessee statute includes some additional language which is not present in the Indiana statute. For example, Tennessee's statute creates an exception for a person who makes an attempt to conceal himself or herself from public view while performing an excretory function in an unincorporated area of the state. Also, it provides that "nudity" does not include a mother in the act of nursing her baby. In addition, the statute's definition of "public place" specifically excludes private residences, single sex public restrooms, enclosed single sex showers, locker and/or dressing room facilities, enclosed motel and hotel rooms designed and intended for sleeping accommodations, doctors' offices, portions of hospitals and similar places in which nudity or exposure is necessarily and customarily expected, modeling classes operated by a proprietary school licensed by the state or a public college supported by taxation, and a private family-oriented clothing optional facilities, properly licensed by the state. Finally, the statute provides that it "shall not apply to any theatrical or musical production . . . performed in a theatre by a professional or amateur theatrical or musical company which has serious artistic merit."

Plaintiffs contend, among other things, that these departures from the exact language of the Indiana statute remove Tennessee's statute from the precedential control of *Barnes*. At this preliminary stage of the litigation, this Court believes that they do not.

Barnes, 111 S.Ct. at 2463-64 (quoting Ind. Code § 35-45-4-1 (1988)).

The definitional exclusions from "public place" of restrooms, doctors' offices, dressing and locker rooms, etc. are little more than common sense conclusions which have no effect on the validity of the law. Certainly no one could argue seriously that the public indecency law was violated by a person using the restroom at the Texaco service station or by being examined by a medical doctor in his office or at the hospital. By adding these clarifications, the legislature was simply stating the obvious. Certainly, even without the definitional exclusions, these locations would not be considered purely "public places." Even though these locations may be used by the public, they still afford some amount of privacy to persons who, by necessity, must sometimes be nude therein. By adding these clarifications, the legislature was codifying what would be the logical, natural, and common-sense interpretation of the public indecency law. That is equally true for the nursing mother provision, as that behavior would not commonly be considered an act of nudity.[4]

The exclusions of modeling classes and for theatrical performances are consistent with the application of the Indiana statute in *Barnes*. In that case, the Court noted that Indiana had not enforced its public indecency law with regard to theatrical performances, ballets, and plays

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[4] The Court cannot explain the inane exception for one who makes an attempt to conceal himself or herself from view while publicly performing an excretory function in an unincorporated area of the state. Apparently, the legislature was especially concerned for persons in rural areas who are working in the field when nature calls and there is no restroom available. However, the Court does not believe that this exclusion renders the statute unconstitutional.

which contained nudity. Though Indiana's exceptions were not codified in the statute and arose through interpretation and application of the Indiana Supreme Court, the result of the lack of enforcement is the same. The Supreme Court, when it addressed the issue of constitutionality of the Indiana statute, did so understanding that the statute had not been applied and enforced against such performances. *See Barnes,* 111 S.Ct. at 2464 n. 2, 2473. Nonetheless, a plurality upheld the constitutionality of the statute as applied.

The purpose of the Court's decision at this point is not to pass on the merits of the ultimate constitutionality of the statute, but to determine whether Plaintiffs have demonstrate a substantial probability of success on the merits. Because of the Tennessee statute's striking similarity to the statute in *Barnes,* and the lack of any substantive proof by Plaintiffs, the Court is not convinced the statute is facially unconstitutional as applied to the Plaintiffs in this case. Therefore, the Court is compelled to find that Plaintiffs have failed to prove that they are likely to succeed on the merits of this case.

Turning now to the second factor, the Court notes that its conclusion with regard to that factor is, by necessity, closely tied to its determination with regard to the first factor. There is not proof before the court with regard to the relative harm to the parties. However, Plaintiffs contend that the harm to them resulting from the law's enforcement would be the violation of their First Amendment rights. Their position is based on the assumption that Chapter 542 is unconstitutional. Having preliminarily determined that Chapter 542 is not facially unconstitutional, this Court finds that Plaintiffs have

failed to prove that they would suffer irreparable harm as a result of its enforcement.

With regard to the third factor, there is no persuasive proof before the Court concerning substantial harm to others. Plaintiffs urge the Court to maintain the status quo by enjoining the enforcement of the statute. Defendants contend the government and citizens represented will be harmed if the law is not enforced. Although, there is a recognized harm which automatically results from a violation of protected speech, the Court has preliminarily found the statute is not facially unconstitutional. Therefore, the Plaintiffs have failed to meet its burden of proof on this issue.

The fourth factor requires the Court to weigh the public interest in the issuance of the injunction. Both the state and the public have an interest in the stability and order which result from the uniform and unhindered enforcement of valid laws. Having preliminarily found that Chapter 542 is a valid law, the Court finds that the state and public interests also weigh in favor of its enforcement.

Accordingly, the Court finds that requisite grounds for the issuance of a preliminary injunction do not exist in this case. For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction is DENIED. This opinion is not a disposition of Plaintiffs' claims on the merits. The case will proceed to trial in due course.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INCORPORATED, et al.,	)	
Plaintiff,	)	
v.	)	No. 3:94-0494
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,	)	Judge Echols
Defendants.	)	

ORDER

Presently pending before the Court is Plaintiffs' Motion for a Preliminary Injunction. On June 16, 1994, a hearing was held at which both sides appeared and presented oral argument with regard to the motion. At the hearing, Defendants were given until June 27, 1994, to file their written response to the motion. For the reasons stated in the memorandum opinion contemporaneously entered herewith, the Motion for Preliminary Injunction is DENIED.

It is so ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX

"E"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INCORPORATED, et al.,	)	
Plaintiff,	)	
v.	)	No. 3:94-0494
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,	)	Judge Echols
Defendants.	)	

ORDER

Presently pending before this Court is Plaintiffs' Motion to Alter or Amend Judgment and to Make Additional Findings. For the reasons outlined herein, that motion is DENIED.

Plaintiffs contend that this Court, in its Order and Memorandum Opinion of June 30, 1994, failed to state with specificity its findings of fact and conclusions of law. Plaintiffs further contend that "this Honorable Court did not fully consider all of the serious Constitutional questions raised by the Plaintiffs in their moving papers and briefs." (Docket Entry No. 20 at 2-3.) Plaintiffs, therefore, move for this Court to make additional findings of fact and conclusions of law addressing the merits of the case.

The issue before the Court was whether to grant Plaintiffs' Motion for a Preliminary Injunction. This Court believes that the rationale for its decision to deny the motion was set forth with sufficient specificity in its

Order and Memorandum of July 1, 1994, as required under Federal Rule of Civil Procedure 52(a). This Court is well aware of the analysis required to evaluate statutes alleged to abridge First Amendment freedoms. The Court's failure to discuss each and every issue raised by the Plaintiffs in challenging the state statue [sic] in question does not mean that each claim was not considered by this Court. Indeed, the Court considered all the claims, but found that under the facts and circumstances presented, Plaintiffs had failed to meets [sic] the burden of proof on the requisite grounds for the issuance of a preliminary injunction. Having decided the issue before the Court, it was not necessary to go forward in its opinion and analyze each of the issues raised by the Plaintiffs.

From Plaintiffs' motion, it appears that Plaintiffs want this Court to reach an ultimate decision on the merits at this early stage without the benefit of Defendants' answers or any proof other than the exhibits attached to the Complaint. The Court declines to do so. The issue before the Court was the request for a preliminary injunction, and that was the issue which this Court addressed. The opinion made clear that it did not dispose of the merits of Plaintiffs' claims, which will be considered in due course.

For the foregoing reasons, Plaintiffs' Motion to Alter or Amend Judgment and to Make Additional Findings is DENIED.

It is so ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX

"F"

DOCKET NO. 1031

(Filed Nov. 2, 1994)

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION

Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al., M.D. Tennessee, C.A. No. 3:94-494
Steve Cooper, et al. v. City of Memphis, et al., W.D. Tennessee, C.A. No. 2:94-2490

BEFORE JOHN F. NANGLE, CHAIRMAN, MILTON POLLACK, ROBERT R. MERHIGE, JR., WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, AND BAREFOOT SANDERS, JUDGES OF THE PANEL

TRANSFER ORDER

This litigation presently consists of two actions pending in the following federal districts: one action each in the Middle District of Tennessee and Western District of Tennessee.[1] Before the Panel is a motion by the Western Tennessee defendants to transfer, pursuant to 28 U.S.C. §1407, the Western Tennessee action to the Middle District of Tennessee for coordinated or consolidated pretrial proceedings with the action pending there. The Middle Tennessee defendants and the Attorney General of the State of Tennessee do not oppose the motion. Plaintiffs in both actions oppose centralization.

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[1] The Panel has been notified that a potentially related action is pending in the Middle District of Tennessee. This action will be treated as a potential tag-along action. *See* Rules 12 and 13, R.P.J.P.M.L., 147 F.R.D. 589, 596-97 (1993).

On the basis of the papers filed,[2] the Panel finds that the actions in this litigation involve common questions of fact concerning federal and state constitutional challenges by adult entertainment establishments and their employees to a 1994 Tennessee statute regulating public indecency. Centralization under Section 1407 in the Middle District of Tennessee will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation, while avoiding duplication of discovery, preventing inconsistent pretrial rulings and conserving the resources of the parties, their counsel and the judiciary.

We are persuaded that the Middle District of Tennessee is the appropriate transferee forum for this docket. We note that i) the first-filed action is pending there; and ii) several parties and witnesses and many documents can be found there.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. §1407, the above-captioned action pending in the Western District of Tennessee be, and the same hereby is, transferred to the Middle District of Tennessee and, with the consent of that court, assigned to the Honorable Robert L. Echols for coordinated or consolidated pretrial

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[2] The parties waived oral argument and therefore the question of centralization of this litigation under Section 1407 was submitted on the briefs. Rule 17, R.P.J.P.M.L., *id.* at 600-601.

proceedings with the above-captioned action pending in that district.

FOR THE PANEL:

/s/ John F. Nangle
John F. Nangle
Chairman

APPENDIX

"G"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF	)	**MDL Docket No. 1031**
TENNESSEE PUBLIC	)	**All Cases**
INDECENCY STATUTE	)	**Judge Echols**
LITIGATION,	)	

MEMORANDUM

Presently pending before this Court are the Motions for Discovery submitted by the Memphis Plaintiffs and Middle District Plaintiffs, to which Defendants have filed a Response. For the reasons more fully discussed herein, Plaintiffs' Motions for Discovery are hereby GRANTED IN PART.

Pursuant to the First Agreed Scheduling Order entered by this Court on January 25, 1995, Plaintiffs have filed the present motions requesting permission for discovery in various areas in order to respond to Defendants' Motion to Dismiss and/or for Summary Judgment. Defendants responded to Plaintiffs' motions, objecting to the following requests for discovery:

(1) Documents, studies or other evidence submitted to members of the Tennessee Legislature at committee hearings by persons generally or at any time by persons connected with or representing the Metropolitan Government of Nashville, including secondary effects of adult entertainment establishments.

(2) Production of documents and depositions from officials of Metropolitan Government of Nashville and Davidson County,

including but not limited to any and all reports prepared by Sgt. Blakeley of the Metro Police Department Intelligence Division as related to representative Fisher and others.

(3) Documents submitted to the legislators at the legislative hearings by persons generally or at any time by persons connected with or representing Metropolitan Government of Nashville including those evidencing secondary effects of adult entertainment establishments and deposition for Metro representatives.

(4) Production of documents and depositions from officials of Metropolitan Government of Nashville as to any sexual crimes claimed as secondary effects related to the adult clubs operating in the Metropolitan area.

(5) Documents or depositions as to any charges under the existing Tenn. Code Ann. § 39-13-511 for any of the conduct in Nashville at any of the adult clubs.

(6) Information of said governments concerning property surrounding adult clubs including new construction and activities which would refute any secondary effects and that statements made as to secondary effects were not correct.

(7) Discovery by way of oral deposition and/or written interrogatories as to any and all legislators or legislative staff having knowledge about any documents, studies or other information received by them concerning Chapter 542 of the Public Acts

of 1994 as finally adopted, or any of the earlier forms, or previous amendments thereto.

(8) Any documentary evidence and depositions as to construction of terms of Chapter 542 or the interpretation by said officials either in the enforcement or in any proposed enforcement of the statute.

(9) Depositions, if volunteered or any privilege waived, by such members or former members of the legislature as to information received concerning the act as a whole or any amendments thereto.

(10) Beer and Alcohol regulations of all applicable and relevant municipalities and counties within the State of Tennessee relating to permitted entertainment at clubs authorized to sell alcoholic beverages of any kind.

(11) Appropriate discovery to the defendants and other parties having knowledge thereof of any law enforcement activities in Nashville and Memphis of Alcohol-By-The-Drink or Beer Regulations as to clubs not identified as "adult entertainment establishments," but which have similar type entertainment.

(12) Beer and alcohol regulations of Metropolitan Government of Nashville and Memphis relating to permitted entertainment at clubs selling beer and alcohol.

(13) Regulations of state on alcohol by the drink as to the conduct permitted in addition to the Tennessee Code provisions for

entertainment and any records of enforcement.

(14) Any enforcement in Nashville and Memphis of alcohol by the drink or beer regulations as to clubs not identified as "adult entertainment establishments," but who have similar type entertainment involving nudity to some extent.

First, Defendants object to the request for discovery of those documents and depositions concerning the secondary effects of adult entertainment establishments operating in the State of Tennessee. Defendants argue that this information is not necessary to respond to their motion for summary judgment because the Supreme Court held in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), that additional proof of secondary effects is not necessary to uphold the constitutionality of a city zoning ordinance restricting the location of adult theaters. *See also Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456, 2470 (1991) (Souter, J., concurring) (stating, "legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects"). Thus, the Defendants contend that because the constitutionality of Tennessee's public indecency statute is not dependent upon the Tennessee legislators' reliance on any additional proof of the secondary effects of nude dancing, evidence concerning any secondary effects the legislators may have relied upon is irrelevant and nondiscoverable.

Plaintiffs correctly point out, however, that although additional evidence of secondary effects may not be necessary to uphold the constitutionality of the statute, if additional evidence of secondary effects was considered,

it is relevant to whether the legislators' reliance upon that evidence was justified. In *Renton*, the Court held:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

475 U.S. at 51, 52. Thus, any evidence relied upon by the Tennessee legislators must be reasonably believed to be relevant to the problem they sought to address, whether or not that evidence regards the secondary effects of nude dancing. For example, if the legislators had relied upon evidence that nude dancing has the effect of increasing domestic violence, Plaintiffs would be entitled to discover that evidence and question its validity. While the legislators may rely upon no additional evidence of secondary effects, any evidence they did indeed rely upon is discoverable. Therefore, the Court hereby grants Plaintiffs' Motions for Discovery with respect to their requests for evidence relied upon by the legislature regarding the secondary effects of nude dancing.

Next, Defendants object to Plaintiffs' request to take depositions of legislators and Metropolitan Government Officials who conversed with legislators. The Court finds this objection to be well-taken. Although the legislative history upon which the legislature as a whole relied is relevant and discoverable to determining the validity of the secondary effects of nude dancing, the individual motivation of each legislator is not. *See Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641, 644-45 (M.D. Fla. 1994).

The Supreme Court clearly stated in *United States v. O'Brien*, 391 U.S. 367 (1968), that courts will not rely upon such evidence in determining the constitutionality of a statute.

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
>
> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 383-84. Thus, only evidence before the legislature as a whole may be considered in determining the constitutionality of the statute. Therefore, Plaintiffs may not take depositions of individual legislators and those with whom they conversed in order to determine what motivated each legislator individually. Plaintiffs must rely upon the evidence presented to the entire legislature. Accordingly, Plaintiffs' Motion for Discovery is hereby denied to the extent they request to take depositions of individual legislators and Metropolitan Government officials.

Finally, Defendants have objected to Plaintiffs' discovery requests concerning beer and alcohol regulations. Defendants argue that Plaintiffs have failed to establish the relevance of these requests to the present case. Plaintiffs have since argued that because Tennessee's public indecency statute provides that it does not affect local beer and alcohol regulations and the beer and alcohol regulations of the cities of Memphis and Nashville permit

women in establishments serving liquor to appear topless, the statute violates the Equal Protection Clause of the Fourteenth Amendment. Although this argument is imaginative given the broad purpose of discovery, the Court finds that Plaintiffs' requests for information relating to beer and alcohol regulations in the State of Tennessee is relevant and discoverable. Accordingly, Plaintiffs' Motions for Discovery are hereby granted with respect to their requests for local beer and alcohol regulations and records of enforcement.

For the foregoing reasons, Plaintiffs' Motions for Discovery are hereby GRANTED IN PART. Defendants shall provide for discovery all information requested but are not required to make available for depositions state legislators and Metropolitan Government officials.

The parties shall confer and submit a detailed plan for conducting the limited discovery set forth herein. This plan shall provide specific deadlines for the completion of discovery; a list of anticipated depositions including target dates and times; and a deadline for responding to the pending motions for summary judgment.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION,	))))	**MDL Docket No. 1031** **All Cases** **Judge Echols**

ORDER

Presently pending before this court are the Motions for Discovery submitted by the Memphis Plaintiffs and Middle District Plaintiffs, to which Defendants have filed a Response. For the reasons more fully discussed in the accompanying Memorandum, Plaintiffs' Motions for Discovery are hereby GRANTED IN PART. Defendants shall provide for discovery all information requested; however, Plaintiffs will not be permitted to depose legislators and Metropolitan Government officials.

The parties shall confer and submit a detailed plan for conducting the limited discovery set forth in the Memorandum contemporaneously entered. This plan shall provide specific deadlines for the completion of discovery; a list of anticipated depositions including target dates and times; and a deadline for responding to the pending motions for summary judgment.

It is so ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX

"H"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF TENNESSEE	)	MDL Docket
PUBLIC INDECENCY STATUTE	)	No. 1031
LITIGATION,	)	All Cases
STATES DISTRICT COURT	)	Judge Echols

MEMORANDUM

Pending before the Court are certain motions filed by some of the Plaintiffs In Re State of Tennessee Public Indecency Statute Litigation (Case No. 3-94-MD-1031), to which Defendants have responded.[1] This litigation has been transferred to this Court under 28 U.S.C. § 1407, which provides for consolidation in multidistrict litigation. The pending motions are listed below:

(1) *DLS, Inc., et al. (hereinafter, "Chattanooga Plaintiffs") v. City of Chattanooga, et al.*, M.D. Tenn., Case No. 3-96-0372; Motion by Chattanooga Plaintiffs to Reconsider and Motion for Stay Pending Appeal (MDL Docket Entry No. 106);

(2) *Deja Vu of Nashville, Inc., et al. (hereinafter "Nashville Plaintiffs") v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, M.D. Tenn., Case No. 3-94-0494; *Steve Cooper, et al. (hereinafter "Memphis Plaintiffs") v. City of Memphis, et al.*, W.D. Tenn., Case No. 94-CV-2590; *James Corbett Chick, d/b/a The Brass*

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[1] Parties and procedural history are discussed fully in this Court's Memorandum of September 30, 1996.

Stables, C & A Entertainment, Inc., and Dawn Pierce (hereinafter "Chick Plaintiffs") v. The Metropolitan Government of Nashville and Davidson County, Tennessee, and Robert E. Kirchner, Jr., M.D. Tenn., 3-94-0571; *James Green, d/b/a Doll House and Lee McDerman, d/b/a/ Treasures (hereinafter, "Jackson Tag-Along Plaintiffs") v. Weakley County, et al.;* Motion by Nashville Plaintiffs, Memphis Plaintiffs, Chick Plaintiffs, and Jackson Tag-Along Plaintiffs for Stay Pending Appeal (MDL Docket Entry No. 109);

(3) *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, M.D. Tennessee, No. 3-94-0494; Motion by Nashville Plaintiffs for Relief from judgment Regarding Amended Complaint (MDL Docket Entry No. 107; and

(4) Memphis Plaintiffs' Motion for Entry of Final Order (MDL Docket Entry No. 122).

I. Chattanooga Plaintiffs' Motion to Reconsider

The Chattanooga Plaintiffs have filed a Motion to Reconsider, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Under Rule 60(b), a court may grant relief from an order, on motion and upon such terms as are just, for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the discovery of new evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) relief is otherwise justified. Plaintiff's Motion suggests two grounds upon which a Court could grant relief: mistake or surprise.

A. Was the Court "Mistaken" in Granting Summary Judgment in MDL 1031?

The Chattanooga Plaintiffs contend that this Court violated the federal Multidistrict Litigation Statute, 28 U.S.C. § 1407, by rendering summary judgment in lieu of providing "coordinated or consolidated pretrial proceedings." Rule 14 of this statute, however, contemplates that district courts may grant summary judgment as part of such proceedings: "actions terminated in the transferee district court by valid judgment, including but not limited to summary judgment, . . . shall not be remanded by the Panel and shall be dismissed by the transferee district court." Multidist. Lit. Rule 14.

As confirmed by a number of other decisions, the transferee court is empowered to enter dispositive pretrial orders terminating the case. *In re Donald J. Trump Casino Securities Litigation-Taj Majal Litigation*, 7 F.3d 357 (3d Cir. 1993), *cert. denied*, 510 U.S. 1178 (1994). Section 1407 is intended to grant to the transferee court the power to rule on all pretrial motions, including motions for summary judgment. *Kaiser Industries Corp. v. Wheeling-Pittsburgh Steel Corp.*, 328 F. Supp. 365 (D. Del. 1971). Once a case has been transferred by the Multidistrict Litigation Panel, the transferee court assumes complete jurisdiction for pretrial purposes and has the authority to settle all dispositive motions, such as those for summary judgment. *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd* 818 F.2d 145 (2d Cir. 1987), *cert. denied by Pinkney v. Dow Chemical Co.*, 484 U.S. 1004 (1988).

The Sixth Circuit has held that a transferee court, under order of the Multidistrict Litigation Panel, has the power to decide motions for summary judgment in a case which has been transferred for the limited purpose of coordinated or consolidated pretrial proceedings. *Humphreys v. Tann*, 487 F.2d 666 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974).

Clearly, under 28 U.S.C. § 1407, district courts may grant summary judgment in consolidated multidistrict cases under the same guidelines which allow summary judgment in non-consolidated cases. The plain language of the statute, annotations to the statute, and case law based on the statute are in accord on this point.

A party may obtain summary judgment if the evidentiary material on file shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. " Fed. R. Civ. P. 56(c).

This Court, for more than two and a half years, has received motions, exhibits, and voluminous filings and legal briefs concerning Chapter 542, the adult entertainment industry, and the effects of public nudity.[2] Representative Plaintiffs and Defendants filed cross-motions

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[2] This Court issued its first ruling on Chapter 542 on July 1, 1994, when it denied the preliminary injunction sought by the Nashville plaintiffs. On November 2, 1994, the Memphis Plaintiffs' case was transferred to this Court for "coordinated or consolidated pretrial proceedings." In re State of Tennessee Public Indecency Statute Litigation. MDL 1031 (J.P.M.L. filed Nov. 8, 1994) (hereinafter "MDL 1031"). The Chick Plaintiffs' case was consolidated with MDL 1031 as a tag-along action on January 5, 1995; the Weakley County and Jackson Plaintiffs'

for summary judgment requesting the case be dismissed based upon the legal issues raised. The Court carefully reviewed the pleadings, affidavits, and the supporting materials submitted, along with the applicable law, and has concluded there is no genuine issue of material fact concerning whether the new state statute violated constitutional protections. This Court is of the opinion its initial decision on this subject was correct and it had the power to grant summary judgment in favor of the Defendants under 28 U.S.C. § 1407. After reconsideration, the Court reaffirms its prior order upholding the constitutionality of the statute (Chapter 542) and on the issues it considered at the summary judgment stage.[3]

B. Was There Unfair "Surprise" in the Court's Granting Summary Judgment in MDL 1031?

The Chattanooga Plaintiffs argue this Court's ruling in MDL 1031 constituted "surprise" within the meaning of Fed. R. Civ. P. 60(b), as the Order issued "entirely without notice or a hearing."

The Court notes it was Chattanooga Plaintiffs who effected the consolidation of the Chattanooga litigation with other pending litigation concerning Chapter 542,

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cases were transferred to this Court on August 2, 1995; and the Chattanooga Plaintiffs became part of MDL 1031 on April 11, 1996.

[3] However, as discussed herein at Section IV, the Court finds that it erroneously granted summary judgment in favor of the Defendants on Nashville Plaintiffs' Complaint without addressing the additional request for a declaratory judgment contained in Nashville Plaintiffs' Amended Complaint.

and that Chattanooga Plaintiffs did so even though the Chapter 542 litigation before the Court at that time had progressed much further than the Chattanooga litigation.[4]

The Court further notes that Chattanooga Plaintiffs were on notice of Motions for Summary Judgment filed by Nashville Plaintiffs,[5] Chick Plaintiffs,[6] Memphis Plaintiffs,[7] Jackson Plaintiffs,[8] Nashville Defendants,[9] Chick Defendants,[10] Memphis Defendants 1,[11] Memphis Defendants 2,[12] Weakley County Defendants,[13] and Chattanooga Defendants.[14]

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[4] See Plaintiffs, Response to the Motion to Vacate the Conditional Transfer Order filed before the Judicial Panel of Multidistrict Litigation on or about March 12, 1996.

[5] Filed in case number 3-94-MD-1031, Docket Entry No. 40.

[6] Filed in case number 3-94-MD-1031, Docket Entry No. 44.

[7] Filed in case number 3-94-MD-1031, Docket Entry No. 35.

[8] Filed in case number 3-94-MD-1031, Docket Entry No. 45.

[9] Originally filed in case number 3-94-0494, Docket Entry No. 30.

[10] Originally filed in case number 3-94-0571, Docket Entry No. 18.

[11] Filed in case number 3-94-0990, Docket Entry No. 0. Defendants' Motion was originally filed in the Western District of Tennessee in case number 94-CV-2590. The docket entry number assigned to Defendants' Motion in that case was Docket Entry No. 25.

[12] Filed in case number 3-94-MD-1031, Docket Entry No. 26.

[13] Filed in case number 3-94-MD-1031, Docket Entry No. 27.

[14] Originally filed in case number 3-96-0372, Docket Entry No. 21.

Furthermore, the Court notes that Chattanooga Plaintiffs had over five months to submit briefs responding to these motions, from April 11, 1996, when the Chattanooga case was transferred to this Court, until September 30, 1996, when summary judgment was granted. Considering Chattanooga Plaintiffs' active desire to join other Plaintiffs in this case, the notice provided by the record that cross-motions for summary judgment were pending before the Court and that arguments had been heard on the dispositive motion, and the opportunity Chattanooga Plaintiffs had to submit briefs regarding genuine issues of material fact, this Court concludes Chattanooga Plaintiffs were not "surprised" under Fed. R. Civ. P. 60(b).

II. The Chattanooga Plaintiffs' Preemption Argument

The Chattanooga Plaintiffs suggest that this Court failed to address the question of whether Chapter 542 effectively preempted local laws against public nudity. Indeed, this Court's Memorandum regarding the constitutionality of Chapter 542 is silent on that question, which had not then been raised by any party.

Had that question been before the Court, the Court would have looked to the intent of the Tennessee legislature regarding preemption. The Tennessee Code anticipates that municipalities will adopt ordinances, and provides a general grant of power to municipal governments to adopt municipal codes. T-C.A. § 6-54-508. With regard to statutes relating to public morals, state law provides that municipalities shall both enforce state law and "tak[e] such other proceedings against such violators

as may be authorized and provided by the ordinances of such municipalities." T.C.A. § 6-54-401.

Where the Tennessee legislature intends for state law to preempt local authority to enact legislation, the applicable statute expressly indicates preemption. For example, T.C.A. § 39-17-509 specifically preempts local governments from regulating offenses for gambling; T.C.A. § 39-17-1551 provides for preemption of local regulation of tobacco products. Nothing in Chapter 542 suggests that the Tennessee state legislature intended that Chapter 542 preempt local law concerning public nudity. Accordingly, this Court concludes that Chapter 542 does not preclude local regulation of public nudity.

III. Plaintiffs' Motion for Stay Pending Appeal

Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, Nashville Plaintiffs, Memphis Plaintiffs, Chick Plaintiffs, Jackson Tag-Along Plaintiffs, and Chattanooga Plaintiffs have filed motions and supporting memoranda of law requesting this Court to grant a stay pending appeal to the Sixth Circuit. These motions, and Defendants' responses, cite *Hilton v. Braunskill,* 481 U.S. 770 (1987), as establishing the following factors to be considered in determining whether a stay should be granted:

> (1) whether the stay applicant has made a showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;

> (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and
>
> (4) whether the granting of the stay would harm or serve the public interest.

Id. at 776. The Sixth Circuit has also applied the Hilton test where parties have moved for a stay. *See Michigan Coalition of Radioactive Material Users v. Griegpenrog*, 945 F.2d 150, 153 (6th Cir. 1991), *rev'd on other grounds*, 954 F.2d 1174 (6th Cir. 1992); *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 306, (6th Cir. 1990); *State of Ohio ex rel. Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987).

A. Plaintiffs' Likelihood of Success on Appeal

Following this Court's denial of the Nashville Plaintiffs Motion for Preliminary Injunction, the Sixth Circuit reversed and remanded the case back to this Court. *Deja Vu et al. v. Metropolitan Government of Nashville and Davidson County*, No. 3-94-MD 1031 (6th Cir. 1996) (not recommended for full-text publication). Without citing specific reasons, the Sixth Circuit concluded this Court had erred in not granting the preliminary injunction, stating that Plaintiffs had "presented sufficient information to demonstrate that a preliminary injunction is warranted."

The parties have filed voluminous information with the Court, including depositions, affidavits, documents, and cross-motions to dismiss and/or for summary judgment. The essential issue before the Court remains the constitutionality of Chapter 542. The Court concluded that no genuine issue of material fact exists to preclude

summary judgment and found that neither Chapter 542 or the Chattanooga city ordinances violate the United States or Tennessee Constitutions. In considering the Plaintiffs' present motion, the Court reaffirms its prior decision and believes Plaintiffs' appeal will fail. Nevertheless, the Court realizes the complexity of law in this area and the divergent opinions surrounding First Amendment speech cases such as the one before the Court. The lack of a bright-line legal demarcation relates to the likelihood of success on the merits in this case. As expressed in the case of *Thomason v. City of Evanston*, 636 F. Supp. 587 (N.D. Ill. 1986):

> The first factor, 'likelihood of success', presents the most conceptual difficulty. Obviously, we think an appeal will probably fail, we have reviewed our opinion and stand by it. Had we thought an appeal would be successful, we would not have ruled as we did in the first place. But a party seeking a stay need not show that it is more than 50% likely to succeed on appeal, otherwise, no district court would ever grant a stay. It is enough that the [stay applicant] have a substantial case on the merits.

Id. at 590. The Court finds the stay applicants have raised a substantial question on the merits in their appeal. Under the circumstances of this case, this is adequate to meet this first question of Plaintiffs' likelihood of success on the merits.

B. Irreparable Injury to Plaintiffs

As noted in this Court's Memorandum of September 30, 1996, the Supreme Court has recognized nude dancing

as expressive conduct marginally within the perimeters of the First Amendment. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). "The loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 377 (1976). The Sixth Circuit has repeatedly followed the *Elrod* language in holding that minimal interference with First Amendment freedoms causes irreparable injury. *See, e.g., G & V Lounge*, 23 F. 3d 1071 (6th Cir. 1994); *In re: King World Productions, Inc.*, 898 F.2d 56, 59 (6th Cir. 1990); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

Since Plaintiffs are engaging in marginally protected First Amendment activity, their right to free expression is violated during the interim if Chapter 542 is enforced now but is ultimately found to be unconstitutional. Thus, they face irreparable injury if Chapter 542 is enforced now, and subsequently is found to be unconstitutional.

C. Injury to Other Interested Parties

Defendants, as well as the public, have an important interest in enforcing the laws passed by the legislature. In considering the relative injury to other interested parties, however, the Court finds that possible confusion and unequal enforcement of the law may result because of different enforcement policies in effect across the state pending the appeal. For example, prior to the Court's decision holding Chapter 542 constitutional, some Defendants voluntarily refrained from enforcing the law until the matter was finally settled, although there was no requirement to do so. There is no way to predict which

law enforcement agencies will enforce the statute and which will wait until the matter is settled on appeal.

Both Plaintiffs and Defendants would suffer losses if Chapter 542 is immediately enforced, and the enforcement policies have to be abandoned later because this Court's decision is overruled. In addition, Defendants apparently have survived over two years without immediate irreparable harm after the Sixth Circuit Court of Appeals directed this Court to issue a preliminary injunction pending a final hearing in this case.

Considering (1) the relative harm being caused by maintaining the status quo, (2) the uncertainty of uniform enforcement of Chapter 542 pending appeal, and (3) the undesirable inconsistencies and harm which would result should the Sixth Circuit ultimately strike this law after enforcement had begun, the Court finds the injury to other interested parties is weighed in favor of Plaintiffs.

D. The Public Interest

As previously stated, Defendants and the public have a strong interest in having this statute enforced. The legislature, as elected representatives of the public, expresses the will of the people. If Chapter 542 is held constitutional on appeal, enjoining its enforcement now "will result in continued harm to the general public and to those individuals who are specifically impacted by the secondary effects of public nudity, including totally nude dancing [as noted in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), by Justice Souter in *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991), and by the Sixth Circuit in

Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994)]."

Defendants contend the harms addressed by the Tennessee legislature in enacting Chapter 542 – the harm to morality as a whole and the creation of deleterious secondary effects such as increased crime and decreased property values – are not adequately addressed by the state's other indecent exposure legislation. *See State of Tennessee v. Raggert*, Criminal Court of Shelby County, Nos. 91-4789 and 91-4788 (dismissing indecent exposure indictment against topless dancer as ordinary viewing person in the club would not be offended). Apparently, this lack of remedy was one of the primary reasons for passing Chapter 542.

The public also has an interest in consistent administration of justice and in the predictability of law enforcement. On balance, the Court finds this factor weighs in favor of Defendants.

E. Conclusion

As the District of Columbia Circuit Court of Appeals noted in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), "a sliding scale applies to [stay application] analysis." *Id.* at 843. "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." *Id.* at 844. *See also Rite-Hite Corp. v. Kelly Co. Inc.*, 629 F. Supp. 1042 (E.D. Wis. 1986), *aff'd*, 819

F.2d 1120 (Fed. Cir. 1987); *Providence Journal Co. v. F.B.I.*, 595 F.2d 889 (1st Cir. 1979).

After weighing and balancing the above factors in toto, the Court concludes, under the circumstances of this case, that Plaintiffs are entitled to a preliminary injunction barring the enforcement of Chapter 542 until the Sixth Circuit Court of Appeals reaches a decision on the constitutionality of the statute. Accordingly, the Court grants Plaintiffs' Motion for a stay pending a decision by the Sixth Circuit.

IV. Nashville Plaintiffs' Motion for Relief from Judgment Regarding Amended Complaint

The issues raised by Nashville Plaintiffs' Motion for Relief from Judgment Regarding Amended Complaint (Docket Entry No. 106) are (1) whether Nashville Plaintiffs' Motion to Amend, March 22, 1996, had been withdrawn before this Court's order of September 30, 1996; and, if so, (2) whether Plaintiffs now should be entitled to reinstate their claim for a declaratory judgment as requested in the Amended Complaint.

Nashville Plaintiffs originally filed their complaint in this action on June 14, 1994. On March 22, 1996, these Plaintiffs filed a Motion to Amend that complaint. Shortly thereafter, on April 30, 1996, Plaintiffs withdrew this motion, and simultaneously filed an Amended Complaint. Defendants did not file an answer to Plaintiffs' original Complaint prior to April 30, 1996.

Rule 15(a) of the Federal Rules of Civil Procedure provides that "[a] party may amend the parties' pleading

once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served." Under Rule 15(a), Plaintiffs had a right to withdraw their Motion to Amend and to submit an amended complaint on April 30, 1996, without leave of Court. Plaintiffs' amended complaint included a request for Declaratory Judgment that they were exempt from the proscriptions of Chapter 542 because the nude and semi-nude dance entertainment offered in their clubs constituted a theatrical production having serious artistic merit, which is one of the stated exceptions to the prohibitions under the statute. The Court did not specifically address this declaratory judgment request in its order on September 30, 1996.

Because of the above oversight, the Court was technically in error when it ruled in its prior Order (Docket Entry No. 105) that Plaintiffs' Motion to Amend was denied as moot. Such error is a "mistake" under Rule 60(b)(1) of the Federal Rules of Civil Procedure. *See Hopper v. Euclid Nursing Home, Inc.*, 867 F.2d (6th Cir. 1989) ("A claim of strictly legal error falls into the category of 'mistake' under Rule 60(b)(1)").

Rule 60 provides that a court may relieve a party from an order in case of mistake. Rule 61 qualifies Rule 60, and states that "no error or defect in any ruling or order . . . is ground for . . . vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." For the reasons expressed below, the

Court concludes that Nashville Plaintiffs should be relieved from the Court's earlier judgment dismissing their entire Amended Complaint, and that Plaintiffs should be permitted to reinstate their claim for declaratory relief.

Nashville Plaintiffs seek a declaratory judgment that they fall within the "theatrical production" exception to Chapter 542, and thus cannot be prosecuted for public indecency. According to these Plaintiffs, they would be entitled to an exemption from the prohibitions under Chapter 542 in two situations: (1) if nude dance performances generally were found to be "theatrical productions" with serious artistic merit as provided in Chapter 542(a)(5); or (2) if Nashville Plaintiffs' performances were found to be "theatrical productions" with serious artistic merit as provided in Chapter 542 (a)(5).

1. Nude Dance Performances Generally

The Court previously addressed the question of whether Chapter 542 is constitutional as applied to nude dancing generally. As the Court noted in its Memorandum of September 30, 1996, the Supreme Court found there is no constitutional right to appear nude in public, even when one does so to convey an erotic message through nude dance performance. *Id.* at 13 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The Sixth Circuit also held that a public indecency ordinance as applied to prohibit nude dancing does not violate the First Amendment. *Triplett Grille v. City of Akron*, 40 F.3d 129 (6th Cir.

1994). Accordingly, the Court found Chapter 542 constitutional despite the fact that it was enacted with specific reference to nude dancing. *Memorandum* at 13, 17.[15]

In view of existing law, the Court's analysis of Chapter 542, and its legislative history, it is not reasonable to contend that nude dancing, generally, is to be excepted from the proscriptions of the statute because it is a theatrical performance of serious artistic merit. In fact, the industry is on notice by the legislature that nude dancing in public is among the behavior specifically proscribed and intended to be prosecuted under the statute. Plaintiffs' attempt to obtain a declaratory judgment from this court that nude dancing generally is a theatrical performance of serious artistic merit and constitutes an exception under Chapter 542 is without merit. As such, to the extent the Amended Complaint seeks to state a claim that all nude dancing falls within the "theatrical production" exception to Chapter 542, the Court reaffirms its earlier dismissal of such claim.

2. Nashville Plaintiffs' Performances

Nashville Plaintiffs also wish to reinstate their claim for a declaratory judgment that their particular performances are "theatrical productions" with "serious artistic merit" within the meaning within the meaning of Chapter 542(a)(5) The Amended Complaint asserts:

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[15] The Court noted, "The preamble to Chapter 542 reflects that the Tennessee legislature enacted the statute in response to *[Barnes v. Glen Theatre]*," *id.* at 13, and "Chapter 542 was designed to address public nudity in general, which necessarily includes nude barroom dancing." *Id.* at 17.

> Plaintiffs Deja Vu of Nashville, Inc., Good Times, Inc., John Christopher Cox, Denise Benson, and Delaina A. Caise, allege that, if Chapter 542 is found not to be impermissibly vague and violative of equal protection in exempting "theatrical productions" which have "serious artistic merit" or for any other reason, then these Plaintiffs are entitled to a Declaratory Judgment holding and declaring that the live nude and semi-nude performance dance entertainment offered by these Plaintiffs constitutes a theatrical production having serious artistic merit, and that, as such, they are exempted from the proscriptions of Chapter 542.

Defendants contend that the above claim is solely based on state law, in that it asks the Court to exempt Plaintiffs' conduct from the statute's coverage. As such, Defendants request that the Court decline to exercise pendent jurisdiction over the claim as a matter of federal-state comity. The Court disagrees.

First, although the language of the above complaint is not entirely clear, the Court finds that it sets forth both state and federal law claims, which claims are virtually indistinguishable. The gravamen of the claim is that Nashville Plaintiffs' conduct cannot, under the First and Fourteenth Amendments, be proscribed by Chapter 542, and thus that Tennessee *must* exempt such conduct from the statute's coverage. Moreover, as discussed in-depth below, the analysis of whether Plaintiffs' expression falls within the "theatrical production" exception under Tennessee law necessarily involves a federally-based analysis. Thus, this case presents a situation in which "the state claim is so closely tied to questions of federal policy

that the argument for exercise of pendent jurisdiction is particularly strong." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727 (1966).

Further, the decision regarding whether to exercise pendent jurisdiction should be grounded on "considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726. In this case, the parties have spent more than two and a half years litigating this case in this court. As such, the above factors militate against forcing litigation of the above claim in state court. Thus, the Court finds that it has jurisdiction to hear Plaintiffs' claim.

Nor is abstention from the question of whether Chapter 542 is unconstitutional as applied to Nashville Plaintiffs' conduct appropriate in this case. *Railroad Comm' n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Abstention by federal courts is generally only proper in limited circumstances, *see Zwickler v. Koota*, 389 U.S. 241, 248 (1967), and is particularly disfavored in cases involving First Amendment rights. *See id.* at 252 ("to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect"); *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965) (holding that abstention is inappropriate in cases where a statute is attacked on its face as violative of the First Amendment). In the present case, piecemeal decision-making regarding the permissible scope of the public indecency law will certainly cause lengthy delay. The longer the delay in deciding the federal constitutional question presented, the more drastic the chilling effect:

those who may wish to engage in expression probably prohibited by the state law will refrain from engaging in such expression pending a decision regarding what conduct is constitutionally proscribable by the law.

Further, the procedural posture of this case, along with considerations of judicial economy and fairness, militate against abstention. This Court has already spent several years considering the issues presented by the parties, and has ruled on the constitutionality of the state law on its face. As noted above, the Court only failed to rule on the current declaratory judgment request as a part of the original summary judgment because of an oversight due to a voluminous record which reflects the initial request was withdrawn, but was later included in the Amended Complaint. Given the time and expense the parties have incurred litigating in this Court, sending them to state court and subjecting them to further delay at this stage would be unfair and inefficient.

Finally, as discussed above, a federal question has been presented along with the state law issue; namely, whether the First Amendment permits Tennessee to prohibit the expressive conduct engaged in by Nashville Plaintiffs. Further, although resolution of the federal question is dependent on a question of state law, even if the Court abstained from the issue, the federal constitutional issues are so closely tied to the state law issue that a federal question could not be avoided.

The "theatrical production" exception states:

> The provisions of this subsection do not apply to any theatrical production which contains

> nudity as defined by this section performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit; *provided, that such production is not in violation of chapter 17, part 9 of this title.*

T.C.A. § 39-13-511(a)(5) (emphasis added). Chapter 17, part 9 of Tennessee Code Annotated defines and proscribes "obscenity." Thus, the above language indicates that, to fall under the "theatrical production" exception, the conduct of Nashville Plaintiffs must be (1) a theatrical production performed in a theater; (2) by a professional or amateur theatrical or musical company; (3) which has serious artistic merit; *and* (4) is not "obscene" as defined by chapter 17, part 9. That part of Tennessee Code Annotated provides a definition of "obscenity" that directly quotes the definition set forth by the United States Supreme Court:

> "Obscene" means:
>
> (A) The average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (B) The average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and
>
> (C) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value[.]

T.C.A. § 39-17-901(10). *See State v. Summers*, 692 S.W.2d 439, 445 (Tenn. Crim. App. 1985) (stating that the Tennessee provision was derived from the United States Supreme Court's test for obscenity set forth in *Miller v.*

California, 413 U.S. 15 (1973)); *Rhoden v. Morgan*, 863 F. Supp. 612, 617 (M.D. Tenn. 1994) ("It is evident from a plain reading of [T.C.A. § 39-17-901(10)] that the definition of "obscene" follows the standard enunciated in [*Miller*]").

Therefore, in order to determine whether Nashville Plaintiffs' conduct falls within the state statutory exemption, the state court must evaluate such conduct under the federal constitutional standards set forth in *Miller*. This federally-based analysis cannot be avoided since, in order to find that Plaintiffs are exempted from the state law, the state court must make a determination that Plaintiffs' conduct is not "obscene" under the Section 901/*Miller* test.

The Supreme Court has held that abstention is inappropriate where an interpretation of state law will not obviate the need to decide a federal question. As the Court stated in *Harmon v. Forssenius*, 380 U.S. 528 (1965):

> If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction. Thus, "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."

Id. at 534-35 (quoting *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415-16 (1964)). *See also Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 n.4 (1984) (stating that, where a state constitutional provision

parallels a federal constitutional standard, the federal court should not abstain to allow the state court to determine whether there is a violation of the state constitutional provision). Thus, because the state law and federal law questions are conflated in this case, abstention is neither necessary or appropriate.

Defendants additionally contend that the as-applied challenge to Chapter 542 is not ripe for review by the Court. In particular, Defendants note that Nashville Plaintiffs have not been prosecuted under the Tennessee law, and that in Nashville there is currently an order in effect advising against prosecution of nude dancing establishments. As such, Defendants assert that this Court has no constitutional authority to hear Plaintiffs' claim at this time.

In assessing whether a claim is ripe for judicial review, a court first examines the likelihood that the harm alleged by the plaintiff will ever come to pass. *Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 568 (6th Cir. 1995) (quoting *United Steelworkers, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194 (6th Cir. 1988)). It then considers whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims. *Id.* Finally, it assesses the hardship to the parties that will result if judicial relief is denied at this stage in the proceedings. *Id.* In cases involving First Amendment rights, a plaintiff need not be actually prosecuted under the state's criminal laws to bring a suit in federal court for declaratory relief. *Steffel v. Thompson*, 415 U.S. 452, 475 (1974) "[F]ederal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat

of enforcement of a disputed state criminal statute, whether the attack is made on the constitutionality of the statute on its face or as applied." *Id.*

In the present case, after weighing the above considerations, the Court finds that Nashville Plaintiffs' claim is ripe for adjudication. Although Nashville Plaintiffs have not actually been prosecuted under Chapter 542, the Court finds that a genuine threat of such prosecution exists. The statute has been enforced against similar establishments in other areas of Tennessee, specifically against non-drinking establishments in Memphis, Tennessee. The non-enforcement advisory currently in effect in Nashville is not mandatory, and could be repealed at any time, allowing for prosecution of Nashville Plaintiffs. Because this threat of prosecution is present, Plaintiffs will likely suffer harm in the absence of judicial redress. *Compare Adult Video*, 71 F.3d at 568 (finding unripe a claim by a consortium of adult video distributors that a particular film was not obscene, where the consortium had not even distributed the film in question, and had not been threatened with prosecution under the state's obscenity laws, but merely argued that their expression was chilled because they feared being prosecuted in the event the film was distributed). As such, the Court rejects Defendants' argument that Nashville Plaintiffs' challenge is unripe.

Finally, Defendants contend that, because this Court is sitting as a court of equity in this matter, under Tennessee common law it should refrain from interfering with the enforcement of the state's criminal laws, including Chapter 542. Again, the Court disagrees. Tennessee courts' practice in this regard is irrelevant to the question

of whether this Court should exercise jurisdiction over Nashville Plaintiffs' claim. Under *Steffel's* holding, it is entirely proper, and in some cases imperative, for a federal court to issue a declaratory judgment regarding the constitutionality of a state criminal law affecting First Amendment freedoms. *Steffel*, 415 U.S. at 475. Indeed, the *Steffel* Court noted that a state's concern with interference in the administration of its criminal laws is significantly lessened in cases involving challenges to those laws as applied to particular complainants, such as the present case. *Id.* at 474.

In sum, the Court finds that Nashville Plaintiffs should be relieved from that portion of the Court's earlier judgment dismissing their challenge to Chapter 542 as applied to the claim in their Amended Complaint that the semi-nude dance entertainment offered in their clubs is exempted under the act and T.C.A. § 39-17-901(10). Accordingly, Nashville Plaintiffs' Motion for Relief from Judgment Regarding Amended Complaint is hereby GRANTED and said claim shall remain.

VI. Memphis Plaintiffs' Motion for Entry of Final Order

Finally, Memphis Plaintiffs have filed a Motion for Entry of Final Order regarding the other motions considered by the Court in this Memorandum. As the Court has already ruled on these motions, Memphis Plaintiffs' Motion is hereby DENIED as MOOT.

V. Conclusion

For the foregoing reasons, the Court finds as follows:

(1) Motion by Chattanooga Plaintiffs to Reconsider (MDL Docket Entry No. 106) is hereby DENIED;

(2) Motion by Chattanooga Plaintiffs for Stay Pending Appeal (MDL Docket Entry No. 106) is hereby GRANTED;

(3) Motion by Nashville Plaintiffs, Memphis Plaintiffs, Chick Plaintiffs, and Jackson Tag-Along Plaintiffs for Stay Pending Appeal (MDL Docket Entry No. 109) is hereby GRANTED;

(4) Motion by Nashville Plaintiffs for Relief from Judgment Regarding Amended Complaint (MDL Docket Entry No. 107) is hereby GRANTED in accord with this opinion. Plaintiffs' claimed exemption under Chapter 542 and T.C.A. § 39-17-901(10) shall remain, but shall not proceed to trial until the Sixth Circuit Court of Appeals rules on the Court's earlier opinion; and

(5) Motion by Memphis Plaintiffs for Entry of Final Order (MDL Docket Entry No. 122) is hereby DENIED as MOOT.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE	)	MDL Docket No. 1031
OF TENNESSEE	)	All Cases
PUBLIC INDECENCY	)	Judge Echols
STATUTE	)	
LITIGATION,	)	

ORDER

Pending before the Court are certain motions filed by some of the Plaintiffs In Re State of Tennessee Public Indecency Statute Litigation (Case No. 3-94-MD-1031). This litigation has been transferred to this Court under 28 U.S.C. § 1407, which provides for consolidation in multi-district litigation. For the reasons discussed in the accompanying Memorandum, the Court finds as follows:

(1) Motion by Chattanooga Plaintiffs to Reconsider (Docket Entry No. 106) is hereby DENIED;

(2) Motion by Chattanooga Plaintiffs for Stay Pending Appeal (Docket Entry No. 106) is hereby GRANTED;

(3) Motion by Nashville Plaintiffs, Memphis Plaintiffs, Chick Plaintiffs, and Jackson Tag-Along Plaintiffs for Stay Pending Appeal (Docket Entry No. 109) is hereby GRANTED;

(4) Motion by Nashville Plaintiffs for Relief from Judgment Regarding Amended Complaint (MDL Docket Entry No. 107) is hereby GRANTED in accord with this opinion. Plaintiffs' claimed exemption under Chapter 542 and T.C.A. § 39-17-901(10) shall remain, but shall not

proceed to trial until the Sixth Circuit Court of Appeals rules on the Court's earlier opinion; and

(5) Motion by Memphis Plaintiffs for Entry of Final Order (Docket Entry No. 122) is hereby DENIED as MOOT.

It is so ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX

"I"

96-6512/6573/97-5924/5938

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: STATE OF TENNESSEE PUBLIC INDECENCY STATUTE. DEJA VU, ET AL.	)	
Plaintiffs-Appellants,	)	ORDER
v.	)	
METRO GOVERNMENT, ET AL.,	)	
Defendants-Appellees.	)	(Filed Mar. 18, 1999)

BEFORE: MARTIN, Chief Judge; NORRIS and BATCHELDER, Circuit Judges.

The court having received three petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX

"J"

39-13-511. **Indecent exposure.** – (A) A person commits an offense who, in a public place or on the private premises of another, or so near thereto as to be seen from such private premises:

(1) Intentionally:

(A) Exposes such person's genitals or buttocks to one (1) or more persons; or

(B) Engages in sexual contact or sexual penetration as defined in § 39-13-501; and

(2) Reasonably expects the acts will be viewed by another and such acts:

(A) Will offend an ordinary viewing person; or

(B) Are for the purpose of sexual arousal and gratification of the defendant.

(b) Indecent exposure is a Class B misdemeanor, unless the defendant is eighteen (18) years of age or older and the victim is under thirteen (13), in which event indecent exposure is a Class A misdemeanor. [Acts 1989, Ch. 591, § 1; 1990, Ch. 980, § 33.]